2008

Orchard Park Care Center; Rock Canyon Rehab and Nursing; and Trinity Mission Health v. Utah Department of Health, Division of Health Systems Improvement : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ORCHARD PARK CARE CENTER; ROCK CANYON REHAB AND NURSING; and TRINITY MISSION HEALTH,	:	
Petitioners,	:	
v.	:	
UTAH DEPARTMENT OF HEALTH, DIVISION OF HEALTH SYSTEMS IMPROVEMENT,	:	Case No. 20081023-CA
Respondent.	:	

BRIEF OF RESPONDENT

On Petition for Judicial Review of Respondent's Order
Denying Petitioners' Motion to Intervene

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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BRIEF OF RESPONDENT

This case involves a petition for review of the Department of Health's order denying the motion to intervene filed by Petitioners, three nursing care facilities that sought to participate in a formal administrative proceeding. That proceeding involved an application for a license to operate a new Medicare-only skilled nursing care facility in Utah County called Pointe Meadows.

JURISDICTION

The Department's order denying intervention was issued on December 4, 2008. R. 470-71, Addendum A. Petitioners timely filed a petition for review on December 15, 2008. Utah Code Ann. § 63G-4-401(3)(a) (West Supp. 2008). This Court has

jurisdiction over the petition for judicial review of the final agency action disallowing intervention. *Id.* §§ 63-4-403(1), 78A-4-103(2)(a) (West Supp. 2008); *see Millard County v. Utah State Tax Comm'n*, 823 P.2d 459, 461 (Utah 1991) (noting that agency order denying intervention is appealable).

ISSUES PRESENTED[1]

1. Does this Court lack jurisdiction to consider the Petition for Review because Petitioners are not "persons" authorized by the Utah Administrative Procedures Act ("UAPA") either to intervene in a formal agency proceeding or to file a petition for judicial review of final agency action?

This issue was raised by Respondent in its Motion to Dismiss, filed under Rule 10, Utah Rules of Appellate Procedure. In an order entered April 29, 2009, the Court deferred ruling on the question until full briefing in the case.

2. Do Petitioners lack legal capacity to commence this original action in the appellate court by filing a Petition for Review?

This issue was raised by Respondent in its Motion to Dismiss, filed under Rule 10, Utah Rules of Appellate Procedure. In an order entered April 29, 2009, the Court deferred ruling on the question until full briefing in the case.

3. Was the Department required to reach the merits of Petitioners' statutory claims in

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[1]Respondent has dropped its argument that the petition for review is moot. Therefore, Respondent will not be addressing Petitioners' Issue IV. *See* Br. of Pet. at 3, 34-36.

ruling on their Petition to Intervene?

This issue was not presented to or ruled upon by the Department and is, therefore, waived by Petitioners. *Summit Cty. Bd. of Equalization v. Tax Comm'n*, 2004 UT App 283, ¶¶ 6, 15, 98 P.3d 782; *Esquivel v. Labor Comm'n of Utah*, 2000 UT 66, ¶ 34, 7 P.3d 777.

4. Was any error by the Department in denying intervention harmless in light of the Department's reasonable determination that the new moratorium on Medicare-only facilities is inapplicable to a licensing process commenced by Pointe Meadows before the statutory deadline in section 26-21-23(5)(a)?

Standard of Review: Under section 63G-4-403(4) of the Utah Administrative Procedures Act, an appellate court can grant relief only if the petitioner for judicial review has been "substantially prejudiced" by the agency's action. *WWC Holding Co., Inc. v. Public Serv. Comm'n*, 2002 UT 23, ¶ 7, 44 P.3d 714. To demonstrate substantial prejudice, a petitioner must show that the alleged error was not harmless. *Id.*; *Stokes v. Board of Review*, 832 P.2d 56, 58 (Utah App. 1992). An error is harmless if it is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. *H.U.F. v. W. P.W.*, 2009 UT 10, ¶ 44, 203 P.3d 943. A determination of harmless error is made by the appellate court in the first instance; thus, there is no standard of review.

The provision at issue, Utah Code Ann. § 26-21-23(4) (West Supp. 2008),[2] grants the Department discretion to make rules to administer and enforce the moratorium. Thus, the agency's determination that Pointe Meadows's Notice of Intent constituted an "application" under section 26-21-23(5)(a) cannot be upset on judicial review under UAPA unless shown to be arbitrary and capricious. *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶¶ 9-10, 148 P.3d 960; *Assoc. Gen. Contractors v. Bd. of Oil, Gas, & Mining*, 2001 UT 112, ¶¶ 18-19, 38 P.3d 291; *see* Utah Code Ann. § 63G-4-403(4)(g)(i) (West Supp. 2008).

5. Did the Division abuse its discretion by not requiring Pointe Meadows to file a new application when it had to change the location of its planned facility?

Standard of Review: Because the Department has been granted discretion to design and administer the health care facility licensing application process and to administer and enforce the new moratorium, the agency's application of the relevant rules to Pointe Meadows is reviewed for abuse of discretion. *Sierra Club*, 2006 UT 74, ¶¶ 9-10; *Assoc. Gen. Contractors*, 2001 UT 112, ¶¶ 18-19.

DETERMINATIVE STATUTES

The text of relevant statutes is included in Addendum B or in the body of this brief.

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[2]This statute is repealed effective July 1, 2011. Utah Code Ann. § 63I-1-226 (West Supp. 2008).

STATEMENT OF FACTS/ STATEMENT OF THE CASE

The Statutory Scheme

Under the Health Care Facility Licensing and Inspection Act, the Department has authority to make rules as necessary to implement the provisions of the Act unless that authority is specifically delegated to the Health Facility Committee. Utah Code Ann. § 26-21-6(2) (West 2004). That 13-member Committee, created within the Department of Health by section 26-1-7, is responsible for making rules that govern the licensing of health care facilities and for approving the types of information applicants must supply in conjunction with their license applications. *Id.* § 26-21-5 (West Supp. 2008). The Act also provides:

> An application for a license shall be made to the department in a form prescribed by the department. The application and other documentation requested by the department as part of the application process shall require such information as the committee determines necessary to ensure compliance with established rules.

Utah Code Ann. § 26-21-9(1) (West 2004). The implementing Department rule entitled "Application" provided in 2007 and still provides: "An applicant for a license shall file a Request for Agency Action/License Application with the Utah Department of Health on a form furnished by the Department." Utah Admin. Code R. 432-2-6(1) (Addendum C). Then, as now, the entire application process was commenced by the filing of a form captioned "Notice of Intent" and payment of filing fees. A completed application form, captioned "Request for Agency Action/Application" is later filed along with all required clearances. Application instructions and the Notice of Intent form are included here as

Addendum D.[3]

Rule 432-2-6 and others make clear that the completed application required by the Department and the Committee was, and is, not just one piece of paper. Although the licensing process starts with a simple form, an "application" comprises many other documents, such as: numerous clearances from local governments pertaining to fire, safety, zoning, and building codes; a detailed feasability study; detailed background information about all persons to be associated with the facility; and a certificate of occupancy, which cannot be provided until construction is complete. Utah Admin. Code R. 432-2-6(2)-(5). Schematic, design development, and working drawings must also be submitted for the required plans review process. Utah Admin. Code R. 432-4-14. In addition, the Department could require other information and documents as part of the application, including license verifications, architectural plans, policy manuals, and financial data. Utah Admin. Code R. 432-2-8. All of these constitute the "other documentation" the Department is statutorily permitted to require as part of the application. Utah Code Ann. § 26-21-9(1) (West 2004). "The Department may issue a license . . . only after the Department has determined the facility complies with adopted

[3]These as well as other forms and agency rules applicable to health care facility licenses are available at http://health.utah.gov/hflcra.

construction rules and has obtained all clearances and certifications." Utah Admin. Code R. 432-4-14(9).

The Problem of Medicare-Only Facilities and Possible Solutions

The Department of Health became concerned in early 2006 about the adverse economic impacts that new Medicare-only skilled nursing facilities could have on other skilled nursing facilities that accept Medicaid patients, for whom federal reimbursement is lower by $200 per day. R. 24-27, 32-34. As the record here amply demonstrates, the Department began actively working in mid-2006 with the legislature, the Health Facility Committee, and concerned parties on this problem. R. 1-52. One agency suggestion in mid-2006 was an administrative moratorium on issuance of new licenses to Medicare-only facilities. R. 28. Discussions among all the stakeholders about the issue showed that a sticking point in adopting any moratorium or new requirements was where to make the cut-off point. Those applicants for Medicare-only facilities who were in the middle of the lengthy licensing process (at least six at the time, R. 15) had already made considerable monetary investments and commitments that could not be undone. R. 3-6.

Although there were early concerns about whether any moratorium could be imposed by administrative rule instead of by statute, R. 29, the Department eventually published a proposed amendment to Rule 432-2-6 that added subsections (8) and (9). This would have imposed a freeze on the processing of any applications for construction of new nursing care facilities or expansion of existing facilities after the effective date of the rule amendment. *Utah State Bulletin*, October 15, 2006, Vol. 2006, No. 20 at 63-64,

Addendum E. The proposed rule amendment was never adopted, however, since the problem was soon taken up by the legislature during its 2007 session.

The Statutory Moratorium on Medicare-only Facilities

The 2007 Utah Legislature enacted legislation, effective February 28, 2007, conditioning the Department's approval of any new skilled nursing facility license on a showing that the applicant's projected Medicare revenues would not exceed 49% of the facility's total revenues. Utah Code Ann. § 26-21-23(2)(c) (West Supp. 2008). The new section grants the Department authority to "make rules to administer and enforce this part in accordance with . . [the] Utah Administrative Rulemaking Act." *Id.* § 26-21-23(4) (West Supp. 2008). Reflecting the concerns discussed at length in the previous months about the effects of any cut-off or new rules on those already embarked on the lengthy licensing process, the legislature provided an exception, stating the criteria in subsection (2) would not apply to a facility that has:

> (a) filed an application with the department and paid all applicable fees to the department on or before February 28, 2007; and
>
> (b) submitted to the department the working drawings, as defined by the department by administrative rule, on or before July 1, 2008.

Id. § 26-21-23(5) (West Supp. 2008) (effective February 28, 2007).

To carry out its enforcement duties under the new provision, the Department submitted a proposed amendment to Utah Admin. Code R. 432-2-6 on March 29, 2007. *See* Addendum C at 82- 83. The amendment added subsection (8), which clarified that a

Notice of Intent can be the "application" referred to in section 26-21-23(5)(a) that must be filed before March 1, 2007. It also added subsection (9), which clarified that **all** the application documentation required by Utah Admin. Code R. 432-4-14(4) and R. 432-4-16–not just "working drawings" as mentioned in new section 26-21-23(5)(b)–needed to be submitted by July 1, 2008 to avoid the newly-enacted prohibition of Medicare-only facilities.[4] This rule amendment was effective May 29, 2007. *Utah State Bulletin*, June 15, 2006, Vol. 2007, No. 12 at 76.

Pointe Meadows' License Application

On February 28, 2007, Gary Burraston filed a Notice of Intent seeking a state license for a new Medicare-only nursing facility in Lehi, named Pointe Meadows, and paid the filing fee. R. 59-60. He later submitted a second form captioned "Request for Agency Action/Application" providing the same and some additional information. R. 61-63. The Division allowed Pointe Meadows to transfer its application to a site in Orem in November 2007 when its property in Lehi was purchased by UDOT under threat of condemnation after construction of the new facility had begun. R. 361; 386-89; Response of Real Party in Interest to Motion to Court of Appeals for Stay, Ex. 1 and 1A. Pointe

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[4]"(8) The requirements contained in Utah Code Section 26-21-23(5)(a) shall be met if a nursing care facility filed a notice of intent or application with the Department and paid a fee relating to a proposed nursing care facility prior to March 1, 2007.

(9) The requirements contained in Utah Code Section 26-21-23(5)(b) shall be met if a nursing care facility complies with the requirements of R432-4-14(4) and R432-4-16 on or before July 1, 2008." Utah Admin. Code R. 432-2-6; Addendum C at 83.

Meadows submitted the requisite Feasibility Study, which was reviewed and approved by the Department's Bureau of Health Facility Licensing, Certification and Resident Assessment and then published for public comment. R. 75-139, 73.[5]

The Petition to Intervene

In February 2008, attorney Stephen Mecham sent a letter seeking a copy of the Feasibility Study and other information about Point Meadows' application. R. 149. On March 25, 2008, he filed a "Statement of Standing and Petition to Intervene of Orchard Park Care Center, Rock Canyon Rehab and Nursing, and Trinity Mission Health and Rehab." R. 153-59, Addendum F. Petitioners were identified as "licensed skilled nursing facilities serving patients in Orem, Utah County, Utah." R. 155. Petitioners contemporaneously filed a document entitled "Comments to Feasibility Study in Opposition to Point Meadows' Application for License . . . and in Support of Statement of Standing and Petition to Intervene." R. 160-311, Addendum G. In this document and its accompanying exhibits, Petitioners complained that: the Notice of Intent was not the "application" that section 26-21-23 required to be filed on or before February 28, 2007; the agency rule allowing the Notice of Intent to meet the deadline was contrary to the statute because it was not an "application"; the Feasibility Study was deficient in numerous ways; the facility should not have been allowed to change its location; existing

[5]The study submitted by Pointe Meadows included an analysis of fifteen competitors for Medicare patients in Utah County, including Orchard Park Care Center and Trinity Mission Health. R. 92-93.

facilities would be negatively impacted by Pointe Meadows' proposed facility; and the quality of care for patients in Utah County would suffer. *Id.*

The Petition to Intervene is Denied

The Petition to Intervene was denied by the Division Director on June 5, 2008. R. 392. The Petitioners sought reconsideration, again arguing that the standards for intervention and standing were satisfied. R. 401-10. The Director granted the reconsideration request in August and referred the matter to a hearing officer. R. 416-28. On December 4, 2008, the Division Director adopted the recommended decision of the hearing officer to affirm the denial of intervention and issue the license to Pointe Meadows. R. 470-71; R. 472-81, Addendum H. Petitioner's December 15, 2008 request to stay the latter portion of the adopted decision was denied by the agency on December 18, 2008, and Pointe Meadows obtained its license that day. R. 486-97; Motion for Stay, Ex. B.

The Petition for Review

On December 15, 2008, Petitioners Orchard Park Care Center, Rock Canyon Rehab and Nursing, and Trinity Mission Health filed a Petition to review the agency order denying intervention. This Court denied Petitioners' renewed Motion for Stay and deferred ruling on Respondent's Suggestion of Mootness. Order of February 23, 2009. *See* note 1, *supra*. The Court also deferred ruling on Respondent's Motion to Dismiss, but declined to strike materials belatedly submitted by Petitioners after briefing on the Rule 10 motion was complete. Order of April 29, 2009.

SUMMARY OF ARGUMENT

The petition for review should be dismissed for lack of jurisdiction because the Petitioners, nursing facilities, are not "persons" capable of being "intervenors" at the agency level or "aggrieved parties" entitled to petition for judicial review under UAPA. Alternatively, the petition should be dismissed because Petitioners lack legal capacity to bring this original action in a Utah court against the Department.

By not raising it below, Petitioners waived the argument that the Department was required to decide the merits of their statutory claims in the course of deciding their Petition to Intervene. In any event, the Department could not have reached the merits of these claims unless and until it permitted Petitioners to intervene in the license application proceeding.

Petitioners cannot show that they were substantially prejudiced by Respondent's denial of their Petition to Intervene because Respondent reasonably determined that the Notice of Intent filed by Pointe Meadows constituted an application within the meaning of section 26-21-23(5)(a). Any error in denying intervention was harmless, precluding Petitioners from obtaining relief on judicial review. Moreover, Petitioners have not shown that Respondent abused its discretion in determining that no new application by Pointe Meadows was needed when the facility site was changed.

If the petition is not dismissed, the agency's order denying intervention should be affirmed.

ARGUMENT

I. THE PETITION SHOULD BE DISMISSED BECAUSE PETITIONERS ARE NOT "PERSONS" ELIGIBLE TO BE "AGGRIEVED PARTIES" ENTITLED TO PETITION FOR JUDICIAL REVIEW UNDER SECTION 63G-4-403(4) OR TO BE INTERVENORS UNDER SECTION 63G-4-207(1)

Under UAPA, only a "party aggrieved" may obtain judicial review of final agency action. Utah Code Ann. § 63G-4-401(1) (West Supp. 2008). The statute defines a "party" as "the agency or other **person** commencing an adjudicative proceeding" as well as "all **persons** permitted . . . to intervene. . . ." *Id.* § 63G-4-103(1)(f) (West Supp. 2008) (emphasis added); *see also id.* § 63G-4-403(4) (West Supp. 2008) ("The appellate court shall grant relief only if . . . it determines that a **person** seeking judicial review has been substantially prejudiced. . . .") (emphasis added). UAPA defines "person" as "an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency." *Id.* § 63G-4-103(1)(g) (West Supp. 2008).

In this action Petitioners seek judicial review of the agency's order denying them intervention. But they do not fall within the statutory definition of a "person." They are not individuals, groups of individuals, partnerships, corporations, or public or private organizations or entities of any character.[6] They are merely buildings that are self-

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[6]Point II discusses at length why Petitioners do not become legal entities simply by being registered as assumed names.

described as nursing facilities. Because they are incapable of becoming parties since they are not persons under UAPA, they cannot be "aggrieved parties," the status one must obtain in order to invoke this Court's statutory jurisdiction on judicial review.

Likewise, Petitioners are not "persons" who could properly have been allowed to intervene in the agency proceeding. "Any **person** not a party may file a signed, written petition to intervene in a formal adjudicative proceeding. . . ." *Id.* § 63G-4-207(1) (West Supp. 2008) (emphasis added). Thus, the agency could not have granted the nursing facilities' petition to intervene in the formal proceeding and thereby make them parties.

Because the nursing homes do not come within the statutory definition of persons who may become intervenors or parties, they lack standing to file a petition for review under section 63G-4-403 that invokes this Court's jurisdiction. Their petition must, therefore, be dismissed for lack of subject matter jurisdiction. *See In re Application of Questar Gas Co.*, 2007 UT 79, ¶¶ 48, 62-63, 175 P.3d 545 (dismissing petition for review for lack of subject matter jurisdiction because petitioners did not fit statutory category of those with "appellate standing").

Relying on the preservation doctrine, Petitioners contend that this issue (as well as that addressed below in Point II) was waived by the Department's failure to raise it in the administrative proceeding, citing *Esquivel v. Labor Comm'n of Utah*, 2000 UT 66, 7 P.3d 777, and the unpublished decision in *Ivie v. Dep't of Workforce Servs.*, 2006 UT App 521. As those cases–and many others concerning preservation of issues at the administrative level–amply demonstrate, however, the preservation doctrine applies to

prevent a **petitioner** for judicial review from raising new (nonjurisdictional) issues for the first time in the appellate court in order to alter the final agency action. It has not been applied to prevent a respondent such as the Division from raising an issue for the first time on direct judicial review before an appellate court.[7] As this Court is aware,

> it is well established that an appellate court may affirm the judgment appealed from "if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis of its ruling or action, and this is true even though such ground or theory was not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court."

First Equity Fed., Inc. v. Phillips Development, L.C., 2002 UT 56, ¶ 11, 52 P.3d 1137 (quoting *Dipoma v. McPhie*, 2001 UT 61, ¶ 18, 29 P.3d 1225). Thus, the Respondent is not barred from raising issues for the first time in this Court that are apparent on the record, as are the issues here.

Finally, even if the Court were unable to apply the "affirm on any ground" principle, the issue of whether Petitioners are "persons" within the meaning of UAPA presents challenges to the agency's and the court's jurisdiction. It can, therefore, be raised at any time. *Ameritemps, Inc. v. Labor Comm'n*, 2005 UT App 491, ¶ 10, 128 P.3d 31, *aff'd*, 2007 UT 8, 152 P.3d 298.

Because Petitioners do not satisfy the statutory requirement that they be "persons"

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[7]*E.g., Esquivel*, 2000 UT 66, ¶ 34; *Speirs v. S. Utah State Univ.*, 2002 UT App 389, ¶ 12 n.5, 60 P.3d 42; *V-1 Oil Co. v. Dep't Environ. Quality*, 904 P.2d 214, 218 n.4 (Utah App.1995).

in order to intervene in the agency proceeding or to file a petition for review of agency action, their petition should be dismissed for lack of jurisdiction.[8] *See In re Application of Questar Gas Co.*, 2007 UT 79, ¶¶ 48, 62-63.

II. THE PETITION MUST BE DISMISSED BECAUSE PETITIONERS, NURSING FACILITIES, LACK THE LEGAL CAPACITY TO BRING THIS ORIGINAL ACTION IN A UTAH COURT

Those who commence legal proceedings must possess the legal capacity to sue. *See, e.g., Haro v. Haro*, 887 P.2d 878 (Utah App. 1994); *see generally* 59 Am. Jur. 2d *Parties* § 24; 67A C.J.S. *Parties* § 11.

Petitioners here are skilled nursing facilities. Petitioners' Motion for Stay at 6, ¶ 8; R. 155, Statement of Standing and Petition to Intervene of Orchard Park Care Center et al. at ¶ 5. They are not corporations, partnerships or other cognizable legal entities. Instead, Petitioners are merely buildings, like the Matheson Courthouse or the Broadway Tower, with no legal existence and no legal capacity to bring an action in a Utah court in their own names. *See Arps v. Eddie Warrior Correctional Center*, 2006 WL 1451245 (W.D. Okla. 2006) (noting jail is not an entity that can sue or be sued).

Respondent filed a Motion for Summary Disposition raising this issue. In response, Petitioners argued (in addition to waiver) that they have legal capacity to sue

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[8]Petitioners also suggest that the Department can, through its rules or practices, transform a nursing facility into a "person" under UAPA or bestow legal capacity to sue. But the Department is only a creature of statute, *Nielson v. Division of Peace Officer Standards and Training*, 851 P.2d 1201, 1204 (Utah App. 1993), and the legislature has granted it no such powers.

because they are registered as DBAs in compliance with section 42-2-10.

As Respondent pointed out in its reply, Petitioners tendered no evidence of their registration as DBA's and, in any event, the statute does not authorize even registered DBA's to bring suit in their own names. To fill the evidentiary gap, Petitioners belatedly filed a Request of the Court to Take Judicial Notice of attached certificates stating that Orchard Park Care Center and Rock Canyon Rehab & Nursing are registered as assumed names and that Trinity Mission Health and Rehab of Provo, LP is registered as a foreign limited partnership. This Court eventually deferred ruling on the merits of the legal capacity issue, but denied Respondent's Motion to Strike the Request and the accompanying certificates. Order of April 29, 2009.

In their opening brief, Petitioners first argue waiver due to Respondent's failure to preserve (addressed above in Point I) and then argue that Respondent waived the defense of their lack of legal capacity by not asserting it in the administrative proceeding. Br. of Pet. at 36-37. At the agency level, however, the issue presented was whether they should be allowed to intervene in the licensing proceeding under UAPA. Thus, there was no reason or opportunity for the Department to raise as a "defense" their lack of legal capacity to sue. [9]

Petitioners did not commence a legal proceeding and assert a claim against the Department in a Utah court, putting their legal capacity to do so at issue, until they filed

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[9]The Department has not adopted Rules 8 and 9 of the Utah Rules of Civil Procedure.

their petition for review in this Court, an original action. *See Sierra Club v. Utah Solid and Hazardous Waste Control Bd.*, 964 P.2d 335, 339 n.1 (Utah App. 1998) ("Technically, the case here [on petition for review of final agency action] is not an appeal but an original proceeding in this court."). Since the appellate rules do not allow for any response to a petition for review, *see* Utah R. App. P. 14, the Department's Rule 10 motion was the first opportunity it had as an opposing party to "plead" the defense of Petitioners' lack of legal capacity to sue. *Compare Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 748 (Utah 1982) (party who passed up pretrial opportunity to amend pleading and raise opponent's incapacity to sue waived that defense under Rule 9).

Next, Petitioners again argue that the certificates belatedly submitted demonstrate that they have legal capacity to sue solely in the assumed names since they evidence compliance with section 42-2-10. Br. of Pet. at 37-38. That section provides:

> Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter . . . (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state[.]

Utah Code Ann. § 42-2-10 (West Supp. 2008). The chapter requires registration of the assumed name that provides the "true names" of the owners of the business and its location as well as payment of registration fees. *See* Utah Code Ann. §§ 42-2-5 to -11 (West 2004). Section 42-2-10, captioned "Penalties," prohibits a person doing business under an assumed name from suing **on behalf of that business** unless the assumed name is properly registered as a DBA and is in good standing. *E.g.*, *Shields v. Santana*, 2000

UT App 298. Similarly, section 48-2a-907 prohibits a foreign limited partnership from maintaining any action in any court of this state unless it has registered. Neither section 42-2-10 nor section 48-2a-907 provides a registered DBA or a registered LP with legal capacity to sue on its own.

In short, section 42-2-10 does not authorize one operating a business under a DBA to sue only in that assumed name, even if it is registered as a DBA and is in good standing. Petitioners have not cited any authority that permits a DBA–which is not a recognized legal entity but merely an assumed name–to bring an action solely in its assumed name, and Respondent is aware of none. Instead, one who does business under an assumed name that is properly registered must still bring suit in the name of a person, a corporation, a partnership–all of which are recognized entities with legal capacity to sue–in its own name or in its name **on behalf of** the business conducted as a DBA. Only in this way can an action be commenced by a party with legal capacity to sue. Thus, the certificates showing that Orchard Park Care Center and Rock Canyon Rehab & Nursing are registered as assumed names do not support a conclusion that they have legal capacity to sue.

Petitioners also submitted a third certificate showing that "Trinity Mission Health and Rehab of Provo, LP" is registered in Utah as a foreign limited partnership, which is a legal entity with capacity to commence an action in Utah courts.[10] Section 48-2a-907

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[10]*See Arndt v. First Interstate Bank*, 1999 UT 91, 991 P.2d 584 (holding that a limited partnership retains its ability to sue and be sued to the extent necessary during the

prevents an unregistered limited partnership from filing an action in Utah courts, but it does not authorize a registered limited partnership to file an action solely in an assumed name. Here, the petition for review was not filed in the name of this limited partnership, but in the name of "Trinity Mission Health," self-described as a "skilled nursing facilit[y]," not as a limited partnership.

Finally, Petitioners argue that they should be allowed to substitute their "corporate names" as allowed by Rule 17, Utah Rules of Civil Procedure,[11] citing no authority but the rule itself. Br. of Petitioners at 39-40. Petitioners have yet to disclose evidence showing who (individual, corporation, partnership, or other legal entity) owns or operates the Petitioners, which are nursing facilities but not legal entities themselves.

In any event, Respondent's claim is that the petition for review should be dismissed because Petitioners lack legal capacity to commence this action by filing a petition for review, not because Petitioners are not the real parties in interest. More

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winding up process); *Hatch v. Davis*, 725 P.2d 1334 (Utah 1986) (holding that only a limited partnership itself, not an individual member of it, could bring an action); *see also* Utah Code Ann. § 48-2c-104 (West 2004) (limited liability company is a separate legal entity); *id.* § 48-2c-110 (West Supp 2008) (limited liability company can sue or be sued in its own name); *see also* Unif. Partnership Act § 201(a) 6 U.L.A. Part I , 91 (1997) ("A partnership is an entity distinct from its partners."); *id.* § 307(a) at 124 ("A partnership may sue and be sued in the name of the partnership.").

[11]"No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commended in the name of the real party in interest." Utah R. Civ. P. 17(a).

importantly, as this Court has noted, substitution of the real party in interest is available under Rule 17 only if the action was originally filed by one with legal capacity to sue. *Graham v. Davis County Solid Waste Mgt. & Energy Recovery Special Serv. Dist.*, 1999 UT App 136, ¶ 16 n.4, 979 P.2d 363 (citing *Haro v. Haro*, 887 P.2d 878, 880 (Utah App. 1994)). Substitution is not available here under these precedents because all three nursing facilities lacked legal capacity to file the petition for review against the Department. The petition for review should, therefore, be dismissed.

III. THE DEPARTMENT WAS NOT REQUIRED TO RULE ON THE MERITS OF PETITIONERS' STATUTORY CLAIMS SINCE THE ONLY MATTER BEFORE IT WAS A PETITION TO INTERVENE

Although Petitioners asserted in their memos and comments to the Department that they believed section 26-21-23(5)(a) precluded consideration of Pointe Meadows' license application, they never raised below the argument they raise here, namely, that the Department was required–in ruling on their petition to intervene–to also decide whether Point Meadows' application can even be considered under section 26-21-23. Br. of Pet. at 17-18. The argument raised on appeal is, therefore, waived because it was not raised first in the administrative proceeding. *Esquivel*, 2000 UT 66, ¶ 34; *Summit Cty. Bd. of Equalization*, 2004 UT App 283, ¶¶ 6, 15; *Speirs*, 2002 UT App. 389, ¶ 12 n.5.

In any case, the only filing pending before the agency was their Petition to Intervene. The only relief requested was "that the Department enter an Order granting Intervenors' petition to intervene in this docket allowing Intervenors to participate to the full extent allowed by law." R. 158. Thus, it would have been improper for the agency to

rule on the merits of their statutory claims unless and until they were allowed to intervene. *See Summit Cty. Bd. of Equalization*, 2004 UT App 283, ¶ 16 (concluding agency could not issue order affecting a nonparty, citing *Ostler v. Buhler*, 1999 UT 99, ¶ 7, 989 P.2d 1073).

IV. ANY ERROR IN DENYING INTERVENTION WAS HARMLESS SINCE THE DEPARTMENT REASONABLY INTERPRETED AND ENFORCED THE MORATORIUM STATUTE AND ITS RULES

Under section 63G-4-403(4) of UAPA, an appellate court can grant relief on judicial review of final agency action only if the petitioner has been "substantially prejudiced." *WWC Holding Co.*, 2002 UT 23, ¶ 7. Under this standard, petitioner must demonstrate that the purported error by the agency is not harmless. *Id.*; *Stokes*, 832 P.2d 56 at 58. An error is harmless if it is sufficiently inconsequential that there is no reasonable likelihood that the error affected the outcome of the proceedings. *H.U.F.*, 2009 UT 10, ¶ 44. Petitioners here have not shown that they were substantially prejudiced by being denied intervention, even assuming that the denial was erroneous.

Petitioners argue that the Department should not have treated the Notice of Intent filed by Pointe Meadows on February 28, 2007 as the "application" in section 26-21-23(5)(a). In their view, the legislature meant the word in that section to include only the Department's form captioned "Request for Agency Action/License Application" and not the Department's form captioned "Notice of Intent." Br. of Pet. at 18-21. Petitioners buttress their argument by claiming that the Department itself defined "application" in February 2007 as only being the form captioned as a "Request for Agency Action/License

Application," citing Utah Admin. Code R. 432-2-6(1). Petitioners are mistaken on both points.

Neither the Health Care Facility Licensing and Inspection Act nor the agency's rules provide a definition of "application." *See* Utah Code Ann. § 26-21-2 (West Supp. 2008). Section 26-21-6(2) gives the Department authority to make rules implementing the Act, while section 26-21-23(4) authorizes it to make rules "to administer and enforce" the Act. The legislature delegated to the Health Facility Committee authority to determine what information is required as part of the application process, but granted the Department unconstrained power to determine the nature of the forms to be used as an "application" and the necessary documentation. Utah Code Ann. § 26-21-5 (West Supp. 2008); *id.* § 26-21-9(1) ("An application for a license shall be made to the department **in a form prescribed by the department** . . . .") (emphasis added).

There is nothing in the rest of the Act or in section 26-21-23 suggesting that the legislature intended to use the word "application" in subsection 23(5)(a) in any specific sense or to designate one or another of the Department's forms as the only document that could entitle an applicant to the benefit of the exception to the new restrictions in section 26-21-23(5). On the contrary, the word is used generically in section 26-21-23, just as the word was used generically in the other sections of the Act cited above.

Because the legislature has granted the Department broad discretion to determine what constitutes an application, an appellate court reviews that determination for reasonableness. *Sullivan v. Utah Bd. of Oil, Gas & Mining*, 2008 UT 44, ¶ 10, 189 P.3d

63; *Sierra Club*, 2006 UT 74, ¶¶ 9-10; *Assoc. Gen. Contractors*, 2001 UT 112, ¶¶ 18-19; *Salt Lake County v. Labor Comm'n*, 2009 UT App 112, ¶ 9, 208 P.3d 1087; *LPI Servs. v. Labor Comm'n*, 2007 UT App 375, ¶¶ 12-14, 173 P.3d 858.

The Department reasonably determined that the generic term "application" means "the form that commences the application process," which is the form captioned "Notice of Intent." For this reason, it treated Pointe Meadows' Notice of Intent on February 28, 2007 as entitled to the exception in section 26-21-23(5)(a). The Department's rational reading of the statute's plain language, later embodied in Rule 432-2-6(8), gives effect to the legislative intention to not penalize those potential licensees who had already begun the licensing process while harmonizing the new prohibition on licenses for facilities with mostly Medicare patients with (a) other sections of the statute and (b) its existing rules governing that lengthy process.

In contrast, Petitioners' reading of the word "application" to mean only the Department form captioned "Request for Agency Action/License Application" would defeat that purpose and render the exception in section 26-21-23(5) meaningless. That application is not complete until the applicant submits the requisite documentation, such as clearances that only are available in the middle of facility construction. *E.g.*, Utah Admin. Code R. 432-2-6(2) (titled "Application" and requiring numerous clearances as part of a "completed application"); Utah Admin. Code R. 432-2-6(5) (requiring feasibility study as "part of its application"); R. 61. For this reason, this second Department form can be submitted up to a year after the Notice of Intent is filed. *See* Addendum D, Notice

of Intent at 2. If, as Petitioners suggest, the word "application" in section 26-21-23(5) means only the Department's form titled "Request for Agency Action/License Application," no one could ever satisfy both subsections (5)(a) and (5)(b) to qualify for the exception to the new licensing limitations.

Moreover, Petitioner's reading of the word "application" would contradict the legislature's intent in drafting the exception provision. Section 26-21-23(5)(b) talks of "working drawings," which are the most detailed construction plans required, usually just before construction starts. *See* Utah Admin. Code R. 432-4-16(3). By excepting from the requirements of section 26-21-23(2) those applicants who filed their application by February 28, 2007, **and** their working plans by July 1, 2008, the legislature demonstrated its understanding that an applicant entitled to the benefit of the statutory exception would have submitted an "application" long before "working drawings" were available. Again, it would be impossible to satisfy section 26-21-23(5)(a) **and** (b) if the word "application" means only the Department's form captioned "Request for Agency Action/License Application."

Finally, Petitioners' reliance on Rule 432-2-6(1) as the Department's definition of "application" is misplaced. *See* Br. of Pet. at 19. It states: "An applicant for a license shall file a Request for Agency Action/License Application on a form furnished by the Department." The rule simply prohibits applicants from using a homemade application form. It does not define an "application" as only the form captioned "Request for Agency Action/License Application."

In light of the complicated ongoing, multi-stage nature of the licensing application process, it is not surprising that the legislature was willing to defer to the agency's expertise in determining what constitutes an "application" for purposes of section 26-21-23(5)(a). The Department acted well within the bounds of that delegated discretion in determining that a Notice of Intent is such an application. Accordingly, its consideration of Pointe Meadows' Notice of Intent as excepted from the limitations in section 26-21-23(2) could not be overturned on judicial review. It follows that any error in denying intervention was harmless. Thus, Petitioners cannot establish that the denial of their Petition to Intervene resulted in substantial prejudice entitling them to relief on judicial review. The Department's order denying intervention should, therefore, be affirmed.

V. THE DEPARTMENT DID NOT ABUSE ITS DISCRETION BY NOT REQUIRING POINTE MEADOWS TO FILE A NEW APPLICATION WHEN THE FACILITY SITE CHANGED

As previously noted, the Utah Legislature has granted the Department broad discretion to design the facility application process and determine what forms, documentation, and information is needed to constitute a complete application for the Department's review. *See* Utah Code Ann. § 26-21-5 (West Supp. 2008); *id.* § 26-21-6(2) (West 2004); *id.* § 26-21-9(1) (West 2004); *id.* § 26-21-23(4) (West Supp. 2008).

Petitioners contend that the change in location of the proposed Pointe Meadows facility, after the original site was purchase under threat of condemnation, required a new

application.[12] Br. of Pet. at 23-24. This argument is inadequately briefed, as Petitioners cite no legal authority in support of it. *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 36 (reiterating " a reviewing court is entitled to have the issues clearly defined with pertinent authority cited. . . ."); *accord Huish v. Munro*, 2008 UT App 283, ¶ 11, 191 P.3d 1242; Utah R. App. P. 24(a)(9). For this reason, the Court should decline to address the issue. *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 37; *Huish*, 2008 UT App 283, ¶ 11.

Alternatively, the Court should reject this claim as meritless. The Department can permit variances from its own rules. Utah Admin. Code R. 432-2-18. Although the unusual factual circumstances Pointe Meadows faced are not specifically addressed by the agency's rules, there is a rule addressing situations in which a new application must be submitted. It does not, however, support Petitioners' argument. Rule 432-2-12 provides that "[a] prospective licensee shall submit a Request for Agency Action/License Application, fees, and required documentation for a new license at least 30 days before any of the following proposed or anticipated changes occur: (a) occupancy of a new or replacement facility [or] (b) change of ownership." Utah Admin. R. 432-2-12(1). The change in Pointe Meadows' location was not a change of "occupancy" in a new or replacement facility, as there was no facility built at the original site and thus no prior occupancy. A change of the proposed facility location does not trigger the rule's

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[12]For the same reasons given above in Point III, the Court should reject Petitioners' claim that the Department's failure to address this argument requires reversal of the Department's grant of a license to Pointe Meadows. *See* Br. of Pet. at 24.

requirement for submitting a new application for a new license. Utah Admin. R. 432-2-12.

Petitioners have cited no authority compelling the Division to treat the change in Pointe Meadows' location as requiring a new application. Moreover, in light of Pointe Meadows' involuntary loss of the original site to UDOT, accepting Petitioners' argument would result in the adverse consequence that the moratorium exception in section 26-21-23(5) was designed to prevent: halting of a licensing process in midstream after the expenditure of considerable resources by the applicant and the licensing agency. Therefore, the Department reasonably exercised its discretion by allowing Pointe Meadows to amend the facility site on its original application.

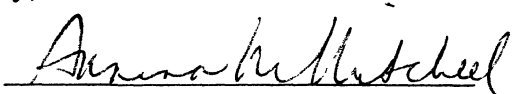
CONCLUSION

For the foregoing reasons in Points I or II, the petition for review should be dismissed. Alternatively, for the reasons stated in Points III, IV, and V, Respondent's order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Because this case involves an unusual fact situation that is unlikely to recur, Respondent does not request either oral argument or a published opinion. If oral argument is held, however, Respondent will participate.

Respectfully submitted this 13th day of July, 2009.



ANNINA M. MITCHELL
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2009, I caused to be mailed, with first-class postage prepaid, two copies of the foregoing BRIEF OF RESPONDENT to:

Stephen K. Mecham
Mark Callister
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10 East South Temple, Suite 900
Salt Lake City, UT 84133

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J. Andrew Sjoblom
HOLME ROBERTS & OWEN LLP
299 South Main Street, Suite 1800
Salt Lake City, UT 84111-2263

ADDENDA

Addedum A

State of Utah

N M HUNTSMAN, JR
Governor

GARY R HERBERT
Lieutenant Governor

Utah Department of Health
Executive Director's Office

David N Sundwall, M D
Executive Director

A Richard Melton Dr P H
Deputy Director

Allen Korhonen
Deputy Director

Health Care Financing

Michael T Hales
Division Director

IN RE: POINTE MEADOWS APPLICATION FOR A SKILLED NURSING FACILITY LICENSE	)	
	)	FINAL AGENCY ORDER
vs.	)	Case No. 08-260-02
UTAH DEPARTMENT OF HEALTH DIVISION OF HEALTH SYSTEMS IMPROVEMENT	)	

IF YOU ARE NOT SATISFIED WITH THIS DECISION, YOU MAY REQUEST A RECONSIDERATION FROM THE DIRECTOR OF HEALTH SYSTEMS IMPROVEMENT WITHIN TWENTY (20) DAYS AFTER THIS DECISION IS SIGNED. IF YOU WOULD LIKE TO APPEAL THIS DECISION, YOU MAY FILE A PETITION IN THE UTAH COURT OF APPEALS WITHIN THIRTY (30) DAYS AFTER THIS DECISION IS SIGNED. IF YOU DECIDE TO APPEAL, YOU ARE NOT REQUIRED TO ASK FOR A RECONSIDERATION FIRST, BUT YOU MAY DO SO IF YOU WISH.

The enclosed Recommended Decision has been reviewed pursuant to Section 63G-4-301 Utah Code, as amended, entitled "Agency Review - Procedure," and Department of Health Administrative Rule R432-30, entitled "Adjudicative Procedure".

I hereby adopt Recommended Decision No. 08-260-02 in its entirety.

RIGHT TO JUDICIAL REVIEW

Within twenty (20) days after the date that this Final Agency Order is issued, you may file a written request for reconsideration with the Director of the Division of Health Systems Improvement. Any request for reconsideration must state the specific grounds upon which relief is requested. The filing of such a request is not a prerequisite for seeking judicial review.

Judicial review may be secured by filing a petition in the Utah Court of Appeals within thirty (30) days of the issuance of this Final Agency Action or, if a request for reconsideration is filed and denied, within thirty (30) days of the denial for reconsideration. The petition shall be served upon the Director of Health Systems Improvement and shall state the specific grounds upon which review is sought. Failure to file such a petition within the 30-day time limit may constitute a waiver of any right to appeal the Final Agency Order.

A copy of this Final Agency Order shall be sent to Petitioner or representative at the last known address by certified mail, return receipt requested.

DATED this 4th day of December 2008

BY: _____

Dr Marc Babitz, Director
Division of Health Systems Improvement
UTAH DEPARTMENT OF HEALTH

Addedum B

§ 63G-4-207. Procedures for formal adjudicative proceedings--Intervention

(1) Any person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding with the agency. The person who wishes to intervene shall mail a copy of the petition to each party. The petition shall include:

(a) the agency's file number or other reference number;

(b) the name of the proceeding;

(c) a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and

(d) a statement of the relief that the petitioner seeks from the agency.

(2) The presiding officer shall grant a petition for intervention if the presiding officer determines that:

(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

(3)(a) Any order granting or denying a petition to intervene shall be in writing and mailed to the petitioner and each party.

(b) An order permitting intervention may impose conditions on the intervenor's participation in the adjudicative proceeding that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.

(c) The presiding officer may impose the conditions at any time after the intervention.

Addedum C

UTAH STATE BULLETIN

OFFICIAL NOTICES OF UTAH STATE GOVERNMENT
Filed March 16, 2007, 12:00 a.m. through April 2, 2007, 11:59 p.m.

Number 2007-8
April 15, 2007

Kenneth A. Hansen, Director
Nancy L. Lancaster, Editor

The *Utah State Bulletin (Bulletin)* is an official noticing publication of the executive branch of Utah State Government. The Department of Administrative Services, Division of Administrative Rules produces the *Bulletin* under authority of Section 63-46a-10, *Utah Code Annotated* 1953.

Inquiries concerning administrative rules or other contents of the *Bulletin* may be addressed to the responsible agency or to: Division of Administrative Rules, 4120 State Office Building, Salt Lake City, Utah 84114, telephone (801) 538-3218, FAX (801) 538-1773. To view rules information, and on-line versions of the division's publications, visit: http://www.rules.utah.gov/

The information in this *Bulletin* is summarized in the *Utah State Digest (Digest)*. The *Digest* is available by E-mail or over the Internet. Visit http://www.rules.utah.gov/publicat/digest.htm for additional information.

Division of Administrative Rules, Salt Lake City 84114

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Utah state bulletin.
Semimonthly.
1. Delegated legislation--Utah--Periodicals. 2. Administrative procedure--Utah--Periodicals.
I. Utah. Office of Administrative Rules.

KFU440.A73S7
348.792'025--DDC 85-643197

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2. NOTICES OF PROPOSED RULES

3. NOTICES OF CHANGES IN PROPOSED RULES

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R414-310-16. Enrollment Limitation.

(1) The Department shall limit enrollment in the Primary Care Network program[~~-and the Covered-at-Work program~~].

(2) The Department may stop enrollment of new individuals at any time based on availability of funds.

(3) The Department and local offices shall not accept applications nor maintain waiting lists during a time period that enrollment of new individuals is stopped.

(4) If enrollment has not been stopped, individuals may apply for the Primary Care Network program[~~-or the Covered-at-Work program~~].

(5) An individual who becomes ineligible for Medicaid, or who must pay a spenddown or premium for Medicaid, but who was not previously enrolled in the Primary Care Network[~~-or Covered-at-Work~~] program, may apply to enroll in the Primary Care Network[~~-or the Covered-at-Work~~] program if the State has not stopped enrollment under R414-310-16(2). If enrollment has been stopped, the individual must wait for an open enrollment period to apply.

R414-310-18. Improper Medical Coverage.

(1) An individual who receives benefits under the Primary Care Network program [~~-or the Covered-at-Work program~~] for which he is not eligible is responsible to repay the Department for the cost of the benefits received.

(2) An alien and the alien's sponsor are jointly liable for benefits received for which the individual was not eligible.

(3) An overpayment of benefits includes all amounts paid by the Department for medical services or other benefits on behalf of an enrollee or for the benefit of the enrollee during a time period that the enrollee was not actually eligible to receive such benefits.

KEY: Medicaid, primary care, covered-at-work, demonstration
Date of Enactment or Last Substantive Amendment: [~~December 16, 2004~~]2007
Authorizing, and Implemented or Interpreted Law: 26-18-1; 26-1-5; 26-18-3

♦ ♦

Health, Health Systems Improvement, Licensing
R432-2-6
Application

NOTICE OF PROPOSED RULE
(Amendment)
DAR FILE NO.: 29750
FILED: 03/29/2007, 13:55

RULE ANALYSIS

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: This rule amendment will specify the licensing requirement changes for new nursing homes, that were made by H.B. 369 during the 2007 Legislative session. (DAR NOTE: H.B. 369 (2007) is found at Chapter 24, Laws of Utah 2007, and was effective 02/28/2007.)

SUMMARY OF THE RULE OR CHANGE: The rule change specifies that the requirements of Subsection 26-21-23(5)(a) will be met if a notice of intent or application was filed with the Department with a related fee prior to 03/01/2007. It also specifies the requirements that a nursing care facility must meet in order to submit working drawings that are associated with the application process.

STATE STATUTORY OR CONSTITUTIONAL AUTHORIZATION FOR THIS RULE: Subsection 26-21-23(4)

ANTICIPATED COST OR SAVINGS TO:
- ❖ THE STATE BUDGET: This rule does not affect any part of the state budget. No impact is expected.
- ❖ LOCAL GOVERNMENTS: This rule does not affect any part of local government budgets. No impact is expected.
- ❖ OTHER PERSONS: This rule amendment will define which prospective health care providers will be able to continue with the licensing process of nursing facilities in lieu of the legislative amendments to Title 26, Chapter 21. Some providers with significant investments will be allowed to continue licensure.

COMPLIANCE COSTS FOR AFFECTED PERSONS: There will be no added compliance costs for this rule amendment. The providers that will continue with licensing of nursing facilities will not have any new requirements added.

COMMENTS BY THE DEPARTMENT HEAD ON THE FISCAL IMPACT THE RULE MAY HAVE ON BUSINESSES: This rule will implement H.B. 369 passed in the 2007 Legislature. The fiscal impact of this rule is positive to allow those facilities that H.B. 369 intended to be allowed to proceed with construction to be protected. David N. Sundwall, MD, Executive Director

THE FULL TEXT OF THIS RULE MAY BE INSPECTED, DURING REGULAR BUSINESS HOURS, AT:
HEALTH
HEALTH SYSTEMS IMPROVEMENT, LICENSING
CANNON HEALTH BLDG
288 N 1460 W
SALT LAKE CITY UT 84116-3231, or
at the Division of Administrative Rules.

DIRECT QUESTIONS REGARDING THIS RULE TO:
Joel Hoffman at the above address, by phone at 801-538-6165, by FAX at 801-538-6163, or by Internet E-mail at jhoffman@utah.gov

INTERESTED PERSONS MAY PRESENT THEIR VIEWS ON THIS RULE BY SUBMITTING WRITTEN COMMENTS TO THE ADDRESS ABOVE NO LATER THAN 5:00 PM on 05/15/2007.

THIS RULE MAY BECOME EFFECTIVE ON: 05/22/2007

AUTHORIZED BY: David N. Sundwall, Executive Director

R432. Health, Health Systems Improvement, Licensing.
R432-2. General Licensing Provisions.
R432-2-6. Application.

(1) An applicant for a license shall file a Request for Agency Action/License Application with the Utah Department of Health on a form furnished by the Department.

(2) Each applicant shall comply with all zoning, fire, safety, sanitation, building and licensing laws, regulations, ordinances, and codes of the city and county in which the facility or agency is located. The applicant shall obtain the following clearances and submit them as part of the completed application to the licensing agency:

(a) A certificate of fire clearance from the State Fire Marshal or designated local fire authority certifying compliance with local and state fire codes is required with initial and renewal application, change of ownership, and at any time new construction or substantial remodeling has occurred.

(b) A satisfactory Food Services Sanitation Clearance report by a local or state sanitarian is required for facilities providing food service at initial application and upon a change of ownership.

(c) Certificate of Occupancy from the local building official at initial application, change of location and at the time of any new construction or substantial remodeling.

(3) The applicant shall submit the following:

(a) a list of all officers, members of the boards of directors, trustees, stockholders, partners, or other persons who have a greater than 25 percent interest in the facility;

(b) the name, address, percentage of stock, shares, partnership, or other equity interest of each person; and

(c) a list, of all persons, of all health care facilities in the state or other states in which they are officers, directors, trustees, stockholders, partners, or in which they hold any interest;

(4) The applicant shall provide the following written assurances on all individuals listed in R432-2-6(3):

(a) None of the persons has been convicted of a felony;

(b) None of the persons has been found in violation of any local, state, or federal law which arises from or is otherwise related to the individual's relationship to a health care facility; and

(c) None of the persons who has currently or within the five years prior to the date of application had previous interest in a licensed health care facility that has been any of the following:

(i) subject of a patient care receivership action;

(ii) closed as a result of a settlement agreement resulting from a decertification action or a license revocation;

(iii) involuntarily terminated from participation in either Medicaid or Medicare programs; or

(iv) convicted of patient abuse, neglect or exploitation where the facts of the case prove that the licensee failed to provide adequate protection or services for the person to prevent such abuse.

(5) An applicant or licensee shall submit a feasibility study as part of its application for a license for a new facility or agency or for a new license for an increase in capacity at a health care facility or expansion of the areas served by an agency.

(a) The feasibility study shall be a written narrative and provide at a minimum:

(i) the purpose and proposed license category for the proposed newly licensed capacity;

(ii) a detailed description of the services to be offered;

(iii) identification of the operating entity or management company;

(iv) a listing of affiliated health care facilities and agencies in Utah and any other state;

(v) identification of funding source(s) and an estimate of the total project capital cost;

(vi) an estimate of total operating costs, revenues and utilization statistics for the twelve month period immediately following the licensing of the new capacity;

(vii) identification of all components of the proposed newly licensed capacity which ensures that residents of the surrounding area will have access to the proposed facility or service;

(viii) identification of the impact of the newly licensed capacity on existing health care providers; and

(ix) a list of the type of personnel required to staff the newly licensed capacity and identification of the sources from which the facility or agency intends to recruit the required personnel.

(b) The applicant or licensee shall submit the feasibility study no later than the time construction plans are submitted. If new construction is not anticipated, the applicant or licensee shall submit the study at least 60-days prior to beginning the new service. The applicant shall provide a statement with the feasibility study indicating whether it claims business confidentiality on any portion of the information submitted and, if it does claim business confidentiality, provide a statement meeting the requirements of Utah Code section 63-2-308.

(c) The Department shall publish public notice, at the applicant's expense, in a newspaper in general circulation for the location where the newly licensed capacity will be located that the feasibility study has been completed. The Department shall accept public comment for 30 days from initial publication. The Department shall retain the feasibility study and make it available to the public.

(d) The Department shall review the feasibility study, summarize the public comment, review demographics of the geographic area involved and prepare a written evaluation to the applicant regarding the viability of the proposed program.

(6) The licensee may apply to designate any number of beds within the facility's licensed capacity as banked beds on a form provided by the Department.

(a) The licensee may apply to designate beds as banked no later than December 1st of each year or upon application for license renewal.

(b) The Department shall thereafter show the facility as having an operational bed capacity equal to the licensed capacity minus any beds banked by the facility.

(c) Banking beds shall not alter the licensed capacity of a facility.

(7) The licensee may apply to return any number of banked beds to operational bed capacity on a form provided by the Department.

(a) The licensee may apply to return banked beds to operational capacity no later than December 1 of each year or upon application for license renewal.

(b) The Department shall thereafter show the facility as having an operational bed capacity equal to the licensed capacity minus any beds still banked by the facility.

(c) Beds previously banked that have been returned to operational capacity must meet the construction and life safety codes that were applicable to the facility at the time the beds were last banked.

(8) The requirements contained in Utah Code Section 26-21-23(5)(a) shall be met if a nursing care facility filed a notice of intent or application with the Department and paid a fee relating to a proposed nursing care facility prior to March 1, 2007.

(9) The requirements contained in Utah Code Section 26-21-23(5)(b) shall be met if a nursing care facility complies with the requirements of R432-4-14(4) and R432-4-16 on or before July 1, 2008.

Addedum D

INFORMATION SHEET

FACILITY/AGENCY LICENSING REQUIREMENTS

The Bureau of Licensing, Certification and Resident Assessment, Division of Health Systems Improvement, Utah Department of Health, licenses all health care facilities and agencies designated by Utah Code 26-21-2. The Department, through the Bureau, will issue a license when it determines that a facility/agency is in compliance with state law and applicable rules.

A facility/agency must first be licensed by the Department prior to obtaining Medicare/Medicaid certification. Certification standards may differ from State Licensure standards. Contact the Survey Manager, Bureau Medicare/Medicaid Program Certification and Resident Assessment, 288 North 1460 West, (4th floor), P.O. Box 144103, Salt Lake City, Utah 84114-4103, telephone no. 801-538-6158 for certification information.

To facilitate the licensing process, the provider should complete the following:

A. NOTICE OF INTENT.

1. Contact the appropriate city/county planning and zoning authority to determine if you are able to establish a business at the desired location.

2. Follow the plan review process for all new construction, or remodeling of an existing building to create a health care facility.

B. LICENSING ORIENTATION.

1. The prospective licensee, or a representative who will be responsible for coordinating the licensure process, must attend a licensing orientation to coordinate review of all required documents and payment of fees, PRIOR TO SUBMITTING ANY LICENSING DOCUMENTS.

2. Read the Health Facility Licensing Rules distributed at the Orientation.

3. Submit a completed "Notice of Intent" and the application fee to the Bureau. THESE ITEMS MUST BE RECEIVED BEFORE ANY LICENSURE REVIEW WILL BE INITIATED.

C. LICENSURE REVIEW OF PROGRAM DESCRIPTION AND POLICY AND PROCEDURE MANUAL. Submit documents at least 90-days prior to the scheduled opening.

1. Prepare a written program description of the functions and location of the proposed facility/agency. The following shall be included: the geographic area to be served, staffing patterns, services to be offered, and other basic information relating to the facility/agency purpose.

2. The policy and procedure manual shall be typed and indexed with a crosswalk. The manual shall address the standards and requirements set forth in the Utah Administrative Code for the proposed health facility/agency license requested. PLEASE ALLOW 60 DAYS AFTER SUBMISSION FOR COMPLETION OF THE INITIAL REVIEW. ADDITIONAL TIME MAY BE REQUIRED TO REVISE THE SUBMITTED POLICY AND PROCEDURE MANUAL BEFORE RECEIVING BUREAU APPROVAL.

D. APPLICATION.

Submit completed application form, licensing fees, and all required clearances to the Bureau.

E. ONSITE INSPECTION.

Schedule a date with the Bureau to conduct an onsite prelicense inspection. Allow at least five days after policy and procedure manual approval for receiving the inspection.

THE FACILITY/AGENCY MAY NOT BEGIN OPERATION UNTIL A LICENSE IS ISSUED.

Bureau of Health Facility Licensing,
Certification and Resident Assessment
PO Box 144103
Salt Lake City, Utah 84114-4103
Telephone No. (801) 538-6158

Utah Department of Health

Promote ■ Prevent ■ Protect

Print Form

UTAH DEPARTMENT OF HEALTH
DIVISION OF HEALTH SYSTEMS IMPROVEMENT
BUREAU OF HEALTH FACILITY LICENSING, CERTIFICATION AND RESIDENT ASSESSMENT

PO BOX 144103
SALT LAKE CITY, UT 84114-4103
(801) 538-6158
(800) 662-4157 toll free
(801) 538-6163 Fax

NOTICE OF INTENT

FACILITY INFORMATION

Select all that apply

☐ MEDICARE CERTIFICATION ☐ MEDICAID CERTIFICATION ☐ STATE LICENSING

PROPOSED NAME

ADDRESS

CITY | STATE | ZIP | Phone Number

ANTICIPATED OPENING DATE

CONTACT INFORMATION

All correspondence and documentation will be mailed to the contact address.

CONTACT NAME | Phone Number

STREET ADDRESS | CITY

MAILING ADDRESS | STATE | ZIP

EMAIL ADDRESS | FAX NUMBER

ALTERNATE CONTACT | PHONE NUMBER

CONSTRUCTION INFORMATION

☐ NEW CONSTRUCTION ☐ ADDITION OR REMODEL

EXISTING LICENSED CAPACITY | NEW ADDITION CAPACITY | NET CAPACITY AT COMPLETION

ANTICIPATED CONSTRUCTION START | ANTICIPATED COMPLETION

ARCHITECT INFORMATION

FIRM NAME

MAILING ADDRESS

CONTACT PERSON | Phone Number

EMAIL ADDRESS | FAX NUMBER

SERVICES TO BE PROVIDED

Please check the service(s) you intend to provide

NURSING CARE FACILITY

- ○ SNF/NF
- ○ SNF
- ○ NF
- ○ ICF/MR

Beds

HOSPITAL

- ○ General
- ○ Critical Access Hospital
- ○ Chemical Dependency
- ○ LTAC
- ○ Psychiatric
- ○ Orthopedic
- ○ Rehabilitation
- ○ Satellite

Beds

HOME HEALTH AGENCY

- ○ Skilled Agency
- ○ Personal Only Care Agency
- ○ Branch

SMALL HEALTH CARE FACILITY

- ○ 16 Beds or less
- ○ Type "N" (3 beds or less)

Beds

HOSPITAL SPECIALTY PROGRAMS

- ☐ Swing Bed Beds
- ☐ PPS Rehab Beds
- ☐ PPS Psych Beds

HOSPICE

- ○ Outpatient Agency
- ○ Inpatient Agency
- ○ Branch

Beds

ASSISTED LIVING

- ○ Type I
- ○ Type II

Beds

OTHER PROVIDER TYPE

○ Portable X-Ray	○ Abortion Clinic	Beds
○ CORF	○ Birthing Center	Beds
○ OPT/SP	○ Mammography	Beds
○ RHC	○ End Stage Renal Dialysis	Stations
	○ Ambulatory Surgical Center	OR's

I have read the contents of this application. By my signature, I certify that the information contained herein is true, correct, and complete, to the best of my knowledge, and I authorize the Bureau of Health Facility Licensing, Certification and Resident Assessment to verify this information. If I become aware that any information in this application is not true, correct, or complete, I agree to notify the Bureau of Health Facility Licensing, Certification and Resident Assessment of this fact immediately. If we have not received the formal Licensing/Certification application and/or the associated licensing fees, this request will be considered closed after 12 months.

Signature

Print Name

Current Date 6/26/09

Addedum E

UTAH STATE BULLETIN

OFFICIAL NOTICES OF UTAH STATE GOVERNMENT
Filed September 16, 2006, 12:00 a.m. through October 2, 2006, 11:59 p.m.

Number 2006-20
October 15, 2006

Kenneth A. Hansen, Director
Nancy L. Lancaster, Editor

The *Utah State Bulletin (Bulletin)* is an official noticing publication of the executive branch of Utah State Government. The Department of Administrative Services, Division of Administrative Rules produces the *Bulletin* under authority of Section 63-46a-10, *Utah Code Annotated* 1953.

Inquiries concerning administrative rules or other contents of the *Bulletin* may be addressed to the responsible agency or to: Division of Administrative Rules, 4120 State Office Building, Salt Lake City, Utah 84114, telephone (801) 538-3218, FAX (801) 538-1773. To view rules information, and on-line versions of the division's publications, visit: http://www.rules.utah.gov/

The information in this *Bulletin* is summarized in the *Utah State Digest (Digest)*. The *Digest* is available by E-mail or over the Internet. Visit http://www.rules.utah.gov/publicat/digest.htm for additional information.

Division of Administrative Rules, Salt Lake City 84114

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Utah state bulletin.
Semimonthly.
1. Delegated legislation--Utah--Periodicals. 2. Administrative procedure--Utah--Periodicals.
I. Utah. Office of Administrative Rules.

KFU440.A73S7
348.792'025--DDC 85-643197

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NOTICES OF
PROPOSED RULES

A state agency may file a PROPOSED RULE when it determines the need for a new rule, a substantive change to an existing rule, or a repeal of an existing rule. Filings received between September 16, 2006, 12:00 a.m., and October 2, 2006, 11:59 p.m. are included in this, the October 15, 2006, issue of the *Utah State Bulletin*.

In this publication, each PROPOSED RULE is preceded by a RULE ANALYSIS. This analysis provides summary information about the PROPOSED RULE including the name of a contact person, anticipated cost impact of the rule, and legal cross-references.

Following the RULE ANALYSIS, the text of the PROPOSED RULE is usually printed. New rules or additions made to existing rules are underlined (e.g., example). Deletions made to existing rules are struck out with brackets surrounding them (e.g., [~~example~~]). Rules being repealed are completely struck out. A row of dots in the text (· · · · · ·) indicates that unaffected text was removed to conserve space. If a PROPOSED RULE is too long to print, the Division of Administrative Rules will include only the RULE ANALYSIS. A copy of each rule that is too long to print is available from the filing agency or from the Division of Administrative Rules.

The law requires that an agency accept public comment on PROPOSED RULES published in this issue of the *Utah State Bulletin* until at least November 14, 2006. The agency may accept comment beyond this date and will list the last day the agency will accept comment in the RULE ANALYSIS. The agency may also hold public hearings. Additionally, citizens or organizations may request the agency to hold a hearing on a specific PROPOSED RULE. Section 63-46a-5 (1987) requires that a hearing request be received "in writing not more than 15 days after the publication date of the PROPOSED RULE."

From the end of the public comment period through February 12, 2007, the agency may notify the Division of Administrative Rules that it wants to make the PROPOSED RULE effective. The agency sets the effective date. The date may be no fewer than 31 days nor more than 120 days after the publication date of this issue of the *Utah State Bulletin*. Alternatively, the agency may file a CHANGE IN PROPOSED RULE in response to comments received. If the Division of Administrative Rules does not receive a NOTICE OF EFFECTIVE DATE or a CHANGE IN PROPOSED RULE, the PROPOSED RULE filing lapses and the agency must start the process over.

The public, interest groups, and governmental agencies are invited to review and comment on PROPOSED RULES. *Comment may be directed to the contact person identified on the RULE ANALYSIS for each rule.*

PROPOSED RULES are governed by *Utah Code* Section 63-46a-4 (2001); and *Utah Administrative Code* Rule R15-2, and Sections R15-4-3, R15-4-4, R15-4-5, R15-4-9, and R15-4-10.

The Proposed Rules Begin on the Following Page.

individual were institutionalized. The Department applies the provisions of Section 1924(d) of the Compilation of Social Security Laws, or the provisions of 42 U.S.C. 435.726 or 435.832 to determine the deduction for a spouse and family members.

~~[(a) Income received by the spouse or dependent family member shall be counted in calculating the deduction if that type of income is countable to determine Medicaid eligibility. No income disregards shall be allowed. Certain needs based income and state supplemental payments shall not be counted in calculating the deduction. Tribal income shall be counted.~~

~~(b) If the income of a spouse or dependent family member is not reported, no deduction shall be allowed for the spouse or dependent family member.~~

~~]([15]~~17) A client ~~[shall not be]~~is not eligible for Medicaid coverage if medical costs are not at least equal to the contribution required towards the cost of care.

~~[(16) To determine an income deduction for a community spouse, the standard utility allowance for households with heating costs shall be equal to the standard utility allowance used by the federal food stamp program. For households without heating costs, actual utility costs shall be used. The maximum allowance for a telephone bill is equal to the amount allowed by the federal food stamp program. Clients shall not be required to verify utility costs more than once in a certification period.~~

~~]([17]~~18) Medicaid covered medical costs incurred in a current benefit month cannot be used to meet spenddown when the client is enrolled in a Medicaid Health Plan. Bills for mental health services incurred in a benefit month cannot be used to meet spenddown if Medicaid contracts with a single mental health provider to provide mental health services to all recipients in the client's county of residence.~~[the client will be eligible for Medicaid and lives in a county which has a single mental health provider under contract with Medicaid to provide services to all Medicaid clients who live in that county.]~~ Bills for mental health services received in a retroactive or application month that the client has fully-paid during that time can be used to meet spenddown ~~[as long as the services were not provided by the mental health provider in the client's county of residence which is under contract with Medicaid to provide services to all Medicaid clients.]~~only if the services were not provided by the Medicaid-contracted, mental health provider.

KEY: financial disclosures, income, budgeting
Date of Enactment or Last Substantive Amendment: [~~July 1,~~]2006
Notice of Continuation: January 31, 2003
Authorizing, and Implemented or Interpreted Law: 26-18-1

Health, Health Systems Improvement, Licensing
R432-2-6
Application

NOTICE OF PROPOSED RULE
(Amendment)
DAR FILE NO.: 29095
FILED: 09/29/2006, 12:50

RULE ANALYSIS

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: This rule is amended to impose a time-limited freeze on processing of certain application for Nursing Care Facilities.

SUMMARY OF THE RULE OR CHANGE: Applications for nursing care facility construction will not be processed by the Department until May 8, 2007, to allow for legislative study of the impact of Medicare-only facilities on Medicaid reimbursement rates.

STATE STATUTORY OR CONSTITUTIONAL AUTHORIZATION FOR THIS RULE: Subsection 26-21-6(2)(c) and Sections 26-21-9 to 26-21-13

ANTICIPATED COST OR SAVINGS TO:
- ❖ THE STATE BUDGET: This amendment should reduce inflationary pressure on Medicaid rates.
- ❖ LOCAL GOVERNMENTS: There is no impact anticipated as no local governments operate these facilities.
- ❖ OTHER PERSONS: Some persons may have to postpone construction plans; the amount of cost is impossible to predict.

COMPLIANCE COSTS FOR AFFECTED PERSONS: Some persons may have to postpone construction plans; the amount of cost is impossible to predict.

COMMENTS BY THE DEPARTMENT HEAD ON THE FISCAL IMPACT THE RULE MAY HAVE ON BUSINESSES: Medicaid pays for over 50% of the patient days in Nursing Homes. Medicare-only facilities are believed to have adverse impacts on cost and quality in Medicaid certified facilities. This temporary freeze will give the Legislature an opportunity to consider the issue in the 2007 legislative session. David N. Sundwall, MD, Executive Director

THE FULL TEXT OF THIS RULE MAY BE INSPECTED, DURING REGULAR BUSINESS HOURS, AT:
HEALTH
HEALTH SYSTEMS IMPROVEMENT, LICENSING
CANNON HEALTH BLDG
288 N 1460 W
SALT LAKE CITY UT 84116-3231, or
at the Division of Administrative Rules.

DIRECT QUESTIONS REGARDING THIS RULE TO:
Joel Hoffman at the above address, by phone at 801-538-6165, by FAX at 801-538-6163, or by Internet E-mail at jhoffman@utah.gov

INTERESTED PERSONS MAY PRESENT THEIR VIEWS ON THIS RULE BY SUBMITTING WRITTEN COMMENTS TO THE ADDRESS ABOVE NO LATER THAN 5:00 PM on 11/14/2006.

THIS RULE MAY BECOME EFFECTIVE ON: 11/21/2006

AUTHORIZED BY: David N. Sundwall, Executive Director

R432. Health, Health Systems Improvement, Licensing.
R432-2. General Licensing Provisions.
R432-2-6. Application.

(1) An applicant for a license shall file a Request for Agency Action/License Application with the Utah Department of Health on a form furnished by the Department.

(2) Each applicant shall comply with all zoning, fire, safety, sanitation, building and licensing laws, regulations, ordinances, and codes of the city and county in which the facility or agency is located. The applicant shall obtain the following clearances and submit them as part of the completed application to the licensing agency:

(a) A certificate of fire clearance from the State Fire Marshal or designated local fire authority certifying compliance with local and state fire codes is required with initial and renewal application, change of ownership, and at any time new construction or substantial remodeling has occurred.

(b) A satisfactory Food Services Sanitation Clearance report by a local or state sanitarian is required for facilities providing food service at initial application and upon a change of ownership.

(c) Certificate of Occupancy from the local building official at initial application, change of location and at the time of any new construction or substantial remodeling.

(3) The applicant shall submit the following:

(a) a list of all officers, members of the boards of directors, trustees, stockholders, partners, or other persons who have a greater than 25 percent interest in the facility;

(b) the name, address, percentage of stock, shares, partnership, or other equity interest of each person; and

(c) a list, of all persons, of all health care facilities in the state or other states in which they are officers, directors, trustees, stockholders, partners, or in which they hold any interest;

(4) The applicant shall provide the following written assurances on all individuals listed in R432-2-6(3):

(a) None of the persons has been convicted of a felony;

(b) None of the persons has been found in violation of any local, state, or federal law which arises from or is otherwise related to the individual's relationship to a health care facility; and

(c) None of the persons who has currently or within the five years prior to the date of application had previous interest in a licensed health care facility that has been any of the following:

(i) subject of a patient care receivership action;

(ii) closed as a result of a settlement agreement resulting from a decertification action or a license revocation;

(iii) involuntarily terminated from participation in either Medicaid or Medicare programs; or

(iv) convicted of patient abuse, neglect or exploitation where the facts of the case prove that the licensee failed to provide adequate protection or services for the person to prevent such abuse.

(5) An applicant or licensee shall submit a feasibility study as part of its application for a license for a new facility or agency or for a new license for an increase in capacity at a health care facility or expansion of the areas served by an agency.

(a) The feasibility study shall be a written narrative and provide at a minimum:

(i) the purpose and proposed license category for the proposed newly licensed capacity;

(ii) a detailed description of the services to be offered;

(iii) identification of the operating entity or management company;

(iv) a listing of affiliated health care facilities and agencies in Utah and any other state;

(v) identification of funding source(s) and an estimate of the total project capital cost;

(vi) an estimate of total operating costs, revenues and utilization statistics for the twelve month period immediately following the licensing of the new capacity;

(vii) identification of all components of the proposed newly licensed capacity which ensures that residents of the surrounding area will have access to the proposed facility or service;

(viii) identification of the impact of the newly licensed capacity on existing health care providers; and

(ix) a list of the type of personnel required to staff the newly licensed capacity and identification of the sources from which the facility or agency intends to recruit the required personnel.

(b) The applicant or licensee shall submit the feasibility study no later than the time construction plans are submitted. If new construction is not anticipated, the applicant or licensee shall submit the study at least 60-days prior to beginning the new service. The applicant shall provide a statement with the feasibility study indicating whether it claims business confidentiality on any portion of the information submitted and, if it does claim business confidentiality, provide a statement meeting the requirements of Utah Code section 63-2-308.

(c) The Department shall publish public notice, at the applicant's expense, in a newspaper in general circulation for the location where the newly licensed capacity will be located that the feasibility study has been completed. The Department shall accept public comment for 30 days from initial publication. The Department shall retain the feasibility study and make it available to the public.

(d) The Department shall review the feasibility study, summarize the public comment, review demographics of the geographic area involved and prepare a written evaluation to the applicant regarding the viability of the proposed program.

(6) The licensee may apply to designate any number of beds within the facility's licensed capacity as banked beds on a form provided by the Department.

(a) The licensee may apply to designate beds as banked no later than December 1st of each year or upon application for license renewal.

(b) The Department shall thereafter show the facility as having an operational bed capacity equal to the licensed capacity minus any beds banked by the facility.

(c) Banking beds shall not alter the licensed capacity of a facility.

(7) The licensee may apply to return any number of banked beds to operational bed capacity on a form provided by the Department.

(a) The licensee may apply to return banked beds to operational capacity no later than December 1 of each year or upon application for license renewal.

(b) The Department shall thereafter show the facility as having an operational bed capacity equal to the licensed capacity minus any beds still banked by the facility.

(c) Beds previously banked that have been returned to operational capacity must meet the construction and life safety codes that were applicable to the facility at the time the beds were last banked.

(8) The Department shall not process any application for construction of new nursing care facilities received after the effective date of this rule. This rule provision shall remain in effect until May 8, 2007.

(9) The Department shall not process any application for additions or remodels to existing structures which would increase the licensed capacity of any existing nursing care facility received after the effective date of this rule, except as permitted in Utah Code Annotated 26-18-503(3)(f) which permits existing facilities to make limited expansions. This rule provision shall remain in effect until May 8, 2007.

KEY: health care facilities, Medicaid
Date of Enactment or Last Substantive Amendment: [~~September 14, 2004~~]2006
Notice of Continuation: January 5, 2004
Authorizing, and Implemented or Interpreted Law: 26-21-6; 26-21-9; 26-21-11; 26-21-12; 26-21-13

♦ ♦

Natural Resources, Water Rights
R655-14
Administrative Procedures for Enforcement Proceedings Before the Division of Water Rights

NOTICE OF PROPOSED RULE
(Amendment)
DAR FILE NO.: 29096
FILED: 09/29/2006, 14:46

RULE ANALYSIS

PURPOSE OF THE RULE OR REASON FOR THE CHANGE: The purpose of the amendment is to clarify portions of the existing rule and to add procedures for determining and imposing administrative fines and penalties.

SUMMARY OF THE RULE OR CHANGE: Several changes clarify some of the definitions in the existing rule. Two changes are submitted to clarify that a respondent has a right to judicial review, and to define the associated time deadlines. Two changes are submitted to clarify the requirements for motions to set aside a Final Judgment and Order. A new section is added to put into rule the process and criteria for determining the administrative fine and penalties that should be assessed for water right violations based upon the considerations outlined in Subsections 73-2-26(2)(a) through (d).

STATE STATUTORY OR CONSTITUTIONAL AUTHORIZATION FOR THIS RULE: Sections 73-2-25 and 73-2-26

ANTICIPATED COST OR SAVINGS TO:
❖ THE STATE BUDGET: No anticipated costs or savings to the State Budget. The administrative fines and penalties section is based on authority given to the State Engineer in Section 73-2-26 and assures that a standard process will be followed to determine the fines and penalties should be imposed for each individual water right violation.
❖ LOCAL GOVERNMENTS: No anticipated costs or savings to the local government. The administrative fines and penalties section is based on authority given to the State Engineer in Section 73-2-26 and assures that a standard process will be followed to determine the fines and penalties should be imposed for each individual water right violation.
❖ OTHER PERSONS: No anticipated costs or savings to other persons. The administrative fines and penalties section is based on authority given to the State Engineer in Section 73-2-26 and assures that a standard process will be followed to determine the fines and penalties should be imposed for each individual water right violation.

COMPLIANCE COSTS FOR AFFECTED PERSONS: No compliance costs other than the requirement to pay the administrative fines and penalties in the event of a water right violation.

COMMENTS BY THE DEPARTMENT HEAD ON THE FISCAL IMPACT THE RULE MAY HAVE ON BUSINESSES: There are no direct fiscal impacts on businesses. If a business unlawfully diverts and uses water, or other similar actions, they could be subject to a penalty and/or fine. The legislation passed during the 2005 General Session and set forth the type and extent of the penalties and fines. These amendments are intended to define the procedures of the State Engineer in enforcement of the law. Michael Styler, Executive Director

THE FULL TEXT OF THIS RULE MAY BE INSPECTED, DURING REGULAR BUSINESS HOURS, AT:
NATURAL RESOURCES
WATER RIGHTS
Room 220
1594 W NORTH TEMPLE
SALT LAKE CITY UT 84116-3154, or
at the Division of Administrative Rules.

DIRECT QUESTIONS REGARDING THIS RULE TO:
Kaelyn Anfinsen at the above address, by phone at 801-538-7370, by FAX at 801-538-7442, or by Internet E-mail at KAELYNANFINSEN@utah.gov

INTERESTED PERSONS MAY PRESENT THEIR VIEWS ON THIS RULE BY SUBMITTING WRITTEN COMMENTS TO THE ADDRESS ABOVE NO LATER THAN 5:00 PM on 11/14/2006.

THIS RULE MAY BECOME EFFECTIVE ON: 11/22/2006

AUTHORIZED BY: Jerry Olds, Director

R655. Natural Resources, Water Rights.
R655-14. Administrative Procedures for Enforcement Proceedings Before the Division of Water Rights.
R655-14-1. Authority.

(1) These rules establish procedures for water enforcement adjudicative proceedings as required by Utah Code Ann. Section 73-2-25 of the Utah Water and Irrigation Code, which authorizes the State Engineer, as the Director of the Utah Division of Water Rights,

Addedum F

Stephen F. Mecham (Bar No. 4089)
Mark L. Callister (Bar No. 6709)
CALLISTER NEBEKER & MCCULLOUGH
10 East South Temple, Suite 900
Salt Lake City, Utah 84133
Tel: (801) 530-7300
Email: sfmecham@cnmlaw.com
mcallister@cnmlaw.com

-BEFORE THE UTAH DEPARTMENT OF HEALTH-

In the Matter of POINTE MEADOWS' Application for Skilled Nursing Facility License	**STATEMENT OF STANDING AND PETITION TO INTERVENE OF ORCHARD PARK CARE CENTER, ROCK CANYON REHAB AND NURSING, AND TRINITY MISSION HEALTH AND REHAB**

Orchard Park Care Center, Rock Canyon Rehab and Nursing, and Trinity Mission Health and Rehab ("Intervenors), by and through counsel, hereby petition the Utah Department of Health ("Department") for intervention in the above entitled matter pursuant to Utah Code Ann. § 63-46b-9.

The grounds for this petition are as follows:

1. Utah Code Ann. § 26-1-4.1 requires that the Department comply with the procedures and requirements of Utah Code Ann. § 63-46b (the Utah Administrative Procedures Act).

2. Pointe Meadows' Notice of Intent to file an application for license as a skilled nursing facility to serve Medicare patients only is within the scope of Utah Code Ann. § 63-46b-1(a) as a state agency licensing action.

3. In Utah Code Admin. R432-30-3(1) the Department has designated all adjudicative proceedings under Utah Code Ann. Title 26 Chapter 21 and Utah Admin. Code R432 to be formal adjudicative proceedings. The Department is a addressing this matter pursuant to these sections.

4. In comments to Pointe Meadows' feasibility study provided for in Utah Admin. Code R432-2-6(5)(c), Intervenors enumerate Pointe Meadows' failure to comply with Utah Code Ann. § 26-21-23 and the Department's rules which invalidate Pointe Meadows' application for license. Interventors' comments are hereby made part of this Petition for Intervention by this reference.

5. Intervenors are licensed skilled nursing facilities serving patients in Orem, Utah County, Utah.

6. Pointe Meadows allegedly filed its original Notice of Intent at the Department February 28, 2007, to meet the deadline for possible licensure of Medicare-only facilities imposed by Utah Code Ann. § 26-21-23. The Notice sought a license for a facility to be constructed in Lehi, Utah. After the February 28, 2007 deadline, Pointe Meadows altered its notice and instead sought to license its proposed Medicare-only skilled nursing facility in Orem, Utah.

7. Utah Admin. Code R432-2-6(5)(a)(viii) requires Pointe Meadows to identify in a feasibility study the impact of its proposed facility on existing health care providers. This rule conforms with the Legislature's finding in Utah Code Ann. § 26-18-502(1)(a) "that an oversupply of nursing care facilities in the state adversely affects the state Medicaid program and the health of the people of the state."

8. Pointe Meadows represents in its feasibility study that its proposed facility would have very little impact on existing health care providers and the overall Medicare census. The

addition of any new facility adversely affects all existing facilities, but Pointe Meadows' move from Lehi to Orem caused the impact on Intervenors to be even more significant and grave. The actual impact on Intervenors is elucidated in the accompanying comments and affidavits, but Pointe Meadows' application will jeopardize the provision of skilled nursing services to Medicaid patients in Orem and in Utah County contrary to the public interest. It will also drive up overall healthcare costs to the detriment of the state's public interest and negatively impact the quality of care provided to Medicaid patients.

9. Intervenors therefore have a significant interest in the above-captioned matter and their legal rights or interests will be substantially affected by the outcome. As stated, the Department's rules require an applicant to state the impact its proposed facility will have on existing facilities and Intervenors must be allowed to participate to present their own impact data. The data Pointe Meadows submitted in its feasibility study is inadequate and inaccurate. Intervenors' participation ensures that the Department has accurate information on which to base a decision.

10. Intervenors' intervention and participation in this proceeding will enhance the interests of justice and will not materially impair the prompt and orderly conduct of this proceeding. Intervenors' petition is timely since they have sought intervention when comments are due and before the Department has made its decision on granting Pointe Meadows a license.

11. Intervenors meet the criteria for intervention and standing under both tests established by the Utah Supreme Court in *Sierra Club v. Sevier Power Co.*, 2006 UT 74, 148 P.3d 960 and *Utah Chapter of the Sierra Club v. Utah Air Quality Board*, 2006 UT 73, 148 P.3d 975.

12. Under the traditional test for standing, the party seeking to intervene must allege (1) that it has been or will be adversely affected by the challenged actions; (2) a causal relationship between the injury to the party, the challenged actions and the relief requested; and (3) that the requested relief is substantially likely to redress the injury claimed. 2006 UT 73 at ¶ 12, 148 P.3d at 980. Intervenors are regulated skilled nursing providers that will lose revenues if the Department grants a license to a Medicare-only facility that diverts Medicare revenues currently used by Intervenors to provide quality care to all patients, including the Medicaid patients that Intervenors are required to serve. The requested relief – denial of the license application – is substantially likely to redress the injury that will occur if Pointe Meadows is permitted to engage in the "cream skimming" conduct that the Utah Legislature concluded was harmful to the public interest.

13. Intervenors also have standing under the alternative test because they have "the interest necessary to effectively assist the [Department] in developing and reviewing all relevant legal and factual questions and where the issues are unlikely to be raised if the party is not given standing." 2006 UT 73 at ¶¶ 11-15. Here, Intervenors are the only parties to raise the issue of Point Meadows' failure to comply with the statutory requirements for filing an application and feasibility study before the February 27, 2007 deadline. As regulated competitors in the service area where the license is being sought, Intervenors have the expertise and interest to ensure that the facts relating to the impact of the proposed facility are presented to the Department so that "all relevant legal and factual questions" are properly addressed.

Intervenors request that copies of all notices and filings in this proceeding be served on:

Stephen F. Mecham
Mark L. Callister
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, Utah 84133
Telephone: 801- 530-7300
Facsimile: 801-364-9127
Email: sfmecham@cnmlaw.com
mcallister@cnmlaw.com

Intervenors request electronic filings where possible.

NOW THEREFORE, Intervenors respectfully request that the Department enter an Order granting Intervenors' petition to intervene in this docket allowing Intervenors to participate to the full extent allowed by law.

Dated this 25th day of March, 2008.

CALLISTER NEBEKER & McCULLOUGH

Stephen F. Mecham
Mark L. Callister

Certificate of Service

I hereby certify that March 25, 2008, a true and correct copy of the Statement of Standing, Petition to Intervene and Comments of Berkeshire Rehabilitation, Orchard Park Care Center, Rock Canyon Rehab and Nursing, and Trinity Mission Health and Rehab Orchard Park Care Center was sent in the United States Mail, postage prepaid, to:

Pointe Meadows
c/o Orem Ventures Inc.
791 West 800 South
Mapleton, Utah 84664

I also hereby certify that I emailed and hand delivered a true and correct copy of the foregoing Statement of Standing, Petition to Intervene and Comments on March 25, 2008 to the office of:

Allan Elkins
Director
Bureau of Health Facility Licensing, Certification, and Resident Assessment
aelkins@utah.gov

Corinne Hoffman
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Department of Health
Bureau of Health Facility Licensing, Certification, and Resident Assessment
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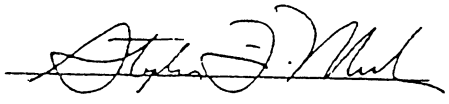

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-BEFORE THE UTAH DEPARTMENT OF HEALTH-

In the Matter of POINTE MEADOWS' Application for a Skilled Nursing Facility License	**COMMENTS TO FEASIBILITY STUDY IN OPPOSITION to Pointe Meadows' Application for License filed by Intervenors in accordance with Utah Administrative Code R432-2-6(5) and in Support of STATEMENT OF STANDING AND PETITION TO INTERVENE**

Orchard Park Care Center, Rock Canyon Rehab & Nursing and Trinity Mission Health & Rehab ("Intervenors"), by and through counsel, make the following comments to Pointe Meadows' Feasibility Study in accordance with Utah Admin. Code R432-2-6(5)(c), in Opposition to Pointe Meadows' application seeking a license for a Medicare-only skilled nursing facility in Orem, Utah, and in support of Statement of Standing and Petition to Intervene. These comments are further supplemented by affidavits from executives of each of the Intervenors, filed concurrently herewith.

I. INTRODUCTION

On its face, Pointe Meadows' application for a Medicare-only skilled nursing facility in Orem, Utah seems harmless. It states that it will provide just 36 beds and take away less than 1% of the area nursing home residents from a burgeoning Utah County with an acute demand for more skilled nursing beds. Unfortunately, the reality is much more alarming The owners of Pointe Meadows hope to capture nearly two-thirds of the highly sought-after Medicare skilled nursing beds in the City of Orem by not serving less lucrative Medicaid patients, a technique referred to as "cream-skimming". The Utah Legislature expressly concluded that such conduct was detrimental to the Utah regulatory plan that requires facilities to serve both Medicare and Medicaid patients in order to qualify for a license. Pointe Meadows is attempting to exploit a loophole in the law by licensing a "Medicare only" facility that will divert the most profitable Medicare patients, while their competitors are required by law to serve Medicaid patients at *below-cost* reimbursement rates.

This cream-skimming will create an immediate imbalance of "haves" and "have nots" among skilled nursing centers that will have a devastating impact on the quality and availability of skilled nursing care in Utah County. Existing facilities in Utah County are currently operating at less than 70% capacity, significantly under the occupancy rates in previous years and well below rates of neighboring mountain states. By taking away the Medicare residents, who subsidize the Medicaid population, Pointe Meadows threatens to create a crisis in elder care in the city of Orem and neighboring communities that will deprive existing facilities of the resources necessary to maintain quality skilled nursing services for all Utah County residents.

The Utah Legislature moved quickly to eliminate this harmful and unfair loophole by (1) enacting a blanket prohibition against the licensing of Medicare-only facilities that had not strictly

complied with the statutory application requirements on or before February 28, 2007, and (2) requiring the Department of Health ("the Department") to consider and analyze the feasibility of proposed facilities, including "the impact of the facility on existing health care providers[1]" when determining whether to license a particular facility. Pointe Meadows failed to meet the statutory application requirement for the facility it is attempting to license. The complete application was not filed on or before February 28, 2007, and the "Notice of Intent" filed instead was not authorized by the Department's rules in effect at that time and was for a different location than the site for which Pointe Meadows is now requesting a license. The owners of Pointe Meadows began construction at the new site on behalf of an entity that had filed no pre-moratorium notice whatsoever, then switched the project to Pointe Meadows after learning that no license could be issued to the other entity because of the moratorium.

Not only must the application for a license be denied for failure to comply with the statutory deadline, that failure proves that the devastating impact of the facility on existing health care providers far outweighs the loss or forfeiture of any resources expended by the owners of Pointe Meadows prior to the legislative ban on Medicare-only facilities. The legislatively-mandated responsibility to license skilled nursing facilities is not just procedural. The Department must also evaluate the substantive impact of the proposed facility on the public interest that the Department is charged to protect. Even assuming (contrary to fact) that Pointe Meadows met the statutory application deadline, the Department should deny the application as contrary to the strong public interest in protecting the quality and availability of skilled nursing services for all residents of Utah County, not just the lucky few who qualify for Medicare coverage. Should Pointe Meadows'

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[1]Utah Admin. Code R432-2-6(5)(a)(viii).

application for license be approved, the Department will send the message that Utah statutes and Department rules can be disregarded by a new and unproven operator, while existing operators who have faithfully and lawfully served Utah County for years, are penalized.

II. STATUTORY BACKGROUND

A. DUE TO OVERSUPPLY, THE UTAH LEGISLATURE IMPOSED A LIMIT ON THE NUMBER OF NURSING CARE FACILITIES.

In 2004, the Utah Legislature expressly found "that an oversupply of nursing care facility programs in the state adversely affects the state Medicaid program and health of the people in the state." UTAH CODE ANN. § 26-18-502(1)(a). The legislature's solution was to limit the number of nursing care facility programs to those with Medicaid certification as of May 4, 2004, with a narrow exception where an applicant could show insufficient bed capacity. In 2007, the Legislature intervened again to protect the public interest and prevent harm to the Medicaid program, this time by imposing a moratorium on licensing non-Medicaid certified nursing care facilities. The Legislature passed the moratorium on February 28, 2007, the final day of the 2007 general legislative session, and it became effective the same day when the governor signed it. The Legislature and the governor acted with unusual speed to close the non-Medicaid licensing option in favor of the public interest. They could not allow the harm to the Medicaid program to continue. Initially the moratorium was set to expire July 1, 2009, but the Legislature acted again in the 2008 general legislative session in furtherance of its underlying public interest concern about harm to the Medicaid program and extended the moratorium to July 1, 2011.

B. LICENSING MEDICARE-ONLY FACILITIES SERIOUSLY THREATENS THE MEDICAID PROGRAM AND HARMS PUBLIC INTEREST.

By imposing the moratorium in 2007 and extending it in 2008, the Legislature recognized that licensing non-Medicaid facilities threatens the same harm to the public interest that it addressed in 2004 and is contrary to the legislative finding in UTAH CODE ANN. § 26-18-502(1)(a). Licensing Medicare-only facilities threatens serious harm to the Medicaid program because Medicare reimbursements are essential to cover the costs of Medicaid patients. Allowing Medicare-only facilities to take Medicare reimbursements without serving Medicaid patients is not fair competition, it is *cream-skimming*, and will invariably drive up the costs of the Medicaid program to the detriment of the entire state. Neither oversupply nor unfair competition is in the public interest. Both separately and together harm the Medicaid program. The October 24, 2006 Minutes from the Utah Commission on Aging are illustrative of this serious harm (See Exhibit "A", p. 4 under "Item 6. Moratorium on Licensing New Long-Term Care Beds"):

> Many facilities have been opened in past years that are not eligible for Medicaid licenses, due to the moratorium that is already in place. These new facilities therefore take only Medicare and private pay residents. There is widespread concern that this has created a 'have' and 'have not' system, where higher paying Medicare and private pay residents are in one set of facilities, while the Medicaid population is isolated in other facilities that are struggling financially because they need Medicare and private pay residents to stay afloat.

To prevent this harm, the Legislature prohibited the licensing of Medicare-only facilities after February 28, 2007, except for those facilities that filed an application with the Department and paid all applicable fees on or before that date. The application requirement ensures that the exception is only extended to applicants who expended *substantial resources* pursuing a non-Medicaid license prior to the February 28, 2007 cutoff date. Given the swiftness of the Legislature's action to protect

the public interest and its imposition of an immediate, absolute deadline, there is no question that the exception was intended to be narrowly construed and strictly enforced.

III. FACTUAL BACKGROUND

On February 28, 2007, Pointe Meadows of Lehi filed a Notice of Intent for a Medicare Facility at 1940 West Pointe Meadows Drive in the City of Lehi. (See Exhibit "B"[2].) On May 10, 2007, Mr. Will Peterson of Pointe Meadows obtained Site Plan and Conditional Use Approval for the Lehi site at a Lehi Planning Commission Meeting,[3] despite the fact that Mr. Peterson was advised that a proposed freeway intersected the property. (See Exhibit "C" pp. 4-5.)

Five months later, on December 12, 2007, Mr. Peterson obtained Site Plan Approval for a skilled nursing facility in Orem, Utah at an Orem Planning Commission Meeting, on behalf of a different entity: "Aspen Meadows Nursing and Rehabilitation." (See Exhibit "D" pp. 7-8.) No Notice of Intent was ever filed on behalf of Aspen Meadows prior to the enactment of the Moratorium.

On January 8, 2008, a Health Facility Plan Review Report was issued by the Bureau of Health Facility Licensing, Certification and Resident Assessment for Utah. (See Exhibit "E" p. 11.) In this report, it referred to the Pointe Meadows Facility as being located in Lehi, Utah, for 30 beds. It listed the owner of the facility as Gary Burraston. The document further indicated that working drawings were received on December 7, 2007. There is no listing of Aspen Meadows on this Report.

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[2] The copy of Notice of Intent obtained by Intervenors is faint and smudged.

[3] The Site Plan and Conditional Use Permit bear a *different* address than the Notice of Intent. The Site Plan address was 2012 North Pointe Meadows Drive.

After learning of the Aspen Meadows facility being constructed in Orem, Justin Allen of Orchard Park, one of the Intervenors, requested a copy of the proposed Orem feasibility study. He was advised that there was no such study. (See Justin Allen Affidavit, ¶ 3.) On February 14, 2008, Gary Burraston and partner Chris Yeates met with Allen and explained that land in Lehi had been purchased and that they were clearing land and sinking footings when the Utah Department of Transportation declared eminent domain for freeway use.[4] Burraston claimed that the feasibility study done for Lehi applied to all of Utah County, and not just for one city, so Aspen Meadows was able to apply it to the Orem property. Because they were in the process of construction, they had to fill out special waiver forms to move their building to Orem, and the application and study were transferred to the Orem location. Burraston indicated that he got a "*special approval, a one-time only exception to the rule to allow the move to Orem.*" He further explained that "we had this coming, because we had applied before the deadline and deserved to be able to build our facility somewhere." Burraston also mentioned that Orem "seemed a better location overall" than Lehi. (See Justin Allen Affidavit, ¶¶ 4-7.)

Burraston claimed that his feasibility study showed there was room for just one Medicare-only building in Orem. He indicated that they would be filing their study shortly and that the public comment period for the Orem feasibility study would be opened up soon thereafter, but he was quick to note that "all negative comments are provided FYI to the owner and have no bearing on the final approval of the license application." (See Justin Allen Affidavit, ¶¶ 6, 8.)

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[4] In discussions with Lorin Powell, City Engineer of the City of Lehi, Mr. Powell indicated that the Utah Department of Transportation has not and cannot declare eminent domain until certain events occur, which are at least one year off.

On February 25, 2008, the Department advised counsel for Intervenors that interested persons could submit comments on the feasibility study, but the Department would not deny the license based on comments. The only purpose for the comments is to give them to the licensee for review. The Department also indicated that it did not matter that Pointe Meadows' facility had moved from Lehi to Orem because it was being constructed in the same service area, citing Utah Code Ann. Section 26-18-503(3)(b) as the statutory authority for that interpretation. After a series of communications, a copy of the feasibility study was obtained by counsel on March 5, 2008 (See Exhibit "F"[5]). The period for public comment expires on March 25, 2008.

In summary, it now appears that the owners were proceeding with a facility in Orem under an entity named "Aspen Meadows", and realized that no Notice of Intent had been filed for a facility under that entity. The owners then changed entities for the Orem facility, transferring the project from the Aspen Meadows entity to the Pointe Meadows entity, hoping to thereby claim exemption from the moratorium.

IV. POINTE MEADOWS' LICENSE SHOULD BE DENIED FOR FAILURE TO COMPLY WITH THE REQUIREMENTS OF U.C.A. § 26-21-23

Pointe Meadows did not file an application before the deadline but instead attempted to meet the narrow exception to the moratorium by allegedly filing a Notice of Intent at the Department February 28, 2007. That failure to comply with the strict requirements of UTAH CODE ANN. § 26-21-23(5) mandates the denial of Pointe Meadows' application for a license for four separate reasons:

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[5] Intervenors have obtained just the "non-confidential" portion of the study, which did not contain page numbers. For ease in reference, page numbers on the bottom right in *italics* have been added.

1. There is no provision for filing a Notice of Intent; the statute requires that an *application* be filed on or before February 28, 2007, and without filing the required application, Pointe Meadows did not meet the deadline;

2. The Department's rules in effect February 28, 2007 required that an applicant file a feasibility study with its application. Pointe Meadows' feasibility study is dated October 2007 and was not filed with the Department until mid-February 2008, both long after the February 28, 2007 application deadline. As a result, even if Pointe Meadows had filed the required application, it would not have been complete by the deadline without the feasibility study;

3. Pointe Meadows' Notice of Intent allegedly filed February 28, 2007 was to license a proposed facility at 1940 West Pointe Meadow Drive in Lehi, Utah, not in Orem, Utah where the facility is now under construction. Such a significant change would constitute a new application and the change occurred after the deadline to meet the exception to the moratorium; and

4. The feasibility study fails to comply with the requirements of Utah Admin. Code R432-2-6.

A. POINTE MEADOWS' NOTICE OF INTENT VIOLATES THE STATUTE AND THE DEPARTMENT'S RULES AND DOES NOT MEET THE REQUIREMENTS OF THE EXCEPTION TO THE MORATORIUM.

UTAH CODE ANN. § 26-21-23(5), the narrow exception to the moratorium, requires that a nursing care facility file an "application" and pay all applicable fees to the Department on or before February 28, 2007. There is no provision for filing a "Notice of Intent" in the law. UTAH CODE ANN. § 26-21-9(1) enables the Department to prescribe the form of an application for license and

under the Department's rules in effect February 28, 2007, an applicant had to file an application, not a Notice of Intent, to meet the requirements of the rule.

The Department did not introduce the Notice of Intent as an alternative to an application until April 15, 2007 when it republished Utah Admin. Code R432-2-6 for comment in rulemaking. By then, however, it was too late to comply with the strict requirements of the statutory exception to the moratorium and the Department could not retroactively accept Pointe Meadows' Notice of Intent as a substitute for an application without violating its own rule.

B. POINTE MEADOWS' NOTICE OF INTENT HAD NO ACCOMPANYING FEASIBILITY STUDY SO EVEN IF POINTE MEADOWS HAD FILED AN APPLICATION, THE APPLICATION WOULD NOT HAVE BEEN COMPLETE BEFORE THE FEBRUARY 28, 2007 DEADLINE AND THE APPLICATION MUST BE REJECTED.

Utah Admin. Code R432-2-6(5) requires that an applicant file a feasibility study with its application. As noted above, the feasability study presented by Pointe Meadows is dated October 2007 and was not filed with the Department until mid-February 2008, nearly a year after the February 28, 2007 application filing deadline. Without the feasibility study, the application is incomplete under the Department's rules in effect at the time the Legislature enacted the exception to the moratorium. Even if Pointe Meadows had filed the required application, it would not have been complete by the February 28, 2007 deadline. Pointe Meadows' incomplete and untimely application should be rejected.

Utah Admin. Code R432-2-6(5)(b) does not excuse Pointe Meadows' failure to file a feasibility study. That rule provides that: "The applicant or licensee shall submit the feasibility study *no later than the time construction plans are submitted.*" (Emphasis added.) Even assuming this language could be construed as contradicting the requirement that the feasibility study be

submitted at the time the application is filed, Pointe Meadows did not submit such a study until long after the construction plans were submitted. The construction plans were submitted to the City of Orem in advance of the December 12, 2007 Orem Planning Commission Meeting, where a site plan was approved. Construction on the site began immediately thereafter. It was not until mid-February, 2008, that the feasibility study was submitted to the Department of Health, more than two months *after* construction plans were submitted. The Department rules do not recognize a grace period, and clearly mandate a **deadline** for filing the study. The study was not filed timely and must be rejected; otherwise, the Department rules have no credibility or legal effect.

As noted elsewhere in this document, the owners of Pointe Meadows apparently realized that they had not met the specific mandates of the Utah Administrative Code, and cut and pasted their study in haste, hoping to that it would go unnoticed. This is not acceptable under Department rules and the study must therefore be rejected.

C. POINTE MEADOWS' NOTICE OF INTENT SOUGHT A LICENSE FOR A FACILITY IN LEHI, UTAH, NOT OREM, UTAH WHERE THE FACILITY IS UNDER CONSTRUCTION AND THAT CHANGE CONSTITUTES A NEW NOTICE AFTER THE FEBRUARY 28, 2007 DEADLINE.

When Pointe Meadows filed its Notice of Intent, it was seeking a license for a facility at 1940 West Pointe Meadow Drive in Lehi, Utah. Today, Pointe Meadows' facility is under construction in Orem, Utah, approximately 12 miles away from the Lehi site. The change alters Pointe Meadows' Notice of Intent so significantly that it constitutes a new Notice filed after the deadline. It appears that the owners of Pointe Meadows deliberately changed locations from Lehi to Orem for reasons other than the threatened freeway; there is clearly other land available in Lehi for a facility.[6] Orem,

[6] Even if the proposed freeway created the need for relocating, it appears that the owners of Pointe Meadows failed to do their homework in checking out their original site; they should not be

however, is a far more desirable location for a skilled nursing facility than Lehi, because of its proximity to hospitals, which provides a fertile referral base. The freeway impediment became the *justification* to re-locate their facility well after the Moratorium was in place.[7]

There is no authority in the law allowing Pointe Meadows to move its facility. Utah Code Ann. § 26-18-503(3), the statute that addresses moving a facility, only applies to Medicaid certification of a *new or renovated* nursing care facility that had been *certified before*, not to a Medicare-only facility seeking a new license. Arguing that location makes no difference is absurd. The impact on existing facilities escalates and worsens the closer the new facility is. Pointe Meadows' move to Orem after the February 28, 2007 deadline, together with the other failures enumerated in these comments requires that Pointe Meadows' Notice of Intent and any application for license be rejected.

D. THE FEASIBILITY STUDY SHOULD BE REJECTED.

As discussed more fully below, Pointe Meadows' feasibility study should be rejected because: (1) it was not filed timely; (2) it was prepared for the wrong location; (3) it contains

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rewarded with a "special exception" from Utah law and Department rules, when such an oversight occurred through their own inadvertance.

[7]The Lehi facility was processed under the "Pointe Meadows" entity. Months later, the owners sought approval with the Orem Planning Commission under a different entity: "Aspen Meadows." However, when the owners realized that no Notice of Intent had been filed for that entity, they transferred the Orem facility to "Pointe Meadows", hoping to *grandfather* it in under the moratorium statute. Then, after getting wind of opposition to the new facility, the owners realized that they had not filed a feas ·ility study for the Orem facility, despite the fact construction was well underway. The owners of the Orem facility rushed to fashion a new feasibility study from an old one, which explains the obvious "cut and paste" document that was filed sometime in February. These belated efforts to comply with the February 28, 2007 filing deadline are further evidence that Pointe Meadows does not qualify for the narrow exception to the legislatively-mandated moritorium against licensing new Medicaid-only facilities.

unsupported and false statements; (4) it vastly distorts and understates the impact on existing facilities; and (5) it fails to provide the Department with the information necessary to evaluate the established criteria for determining whether granting the proposed license is in the public interest.

1. THE FEASIBILITY STUDY IS UNTIMELY.

As noted above, the filing of the feasibility study violates at least two provisions of the Utah Administrative Code. R432-2-6(5) requires that the Study "be submitted as part of its application for a license." R432-2-6(5)(b) requires that the Study be submitted "no later than the time construction plans are submitted." Neither deadline was met by Pointe Meadows.

2. THE FEASIBILITY STUDY WAS PREPARED FOR THE WRONG LOCATION.

Although an effort has been made to camouflage the original site for which the study was prepared, there are telltale signs of its origin throughout. On p. 12 of the study, under the category "Feasibility Study", the "cut and paste" nature of the document is obvious. The second sentence states: "This feasibility study has taken into consideration all *adjacent communities* to Orem City and within Utah County." It is readily observable that the word "Orem" replaces a different word, presumably "Lehi"; the word "Orem" is out of alignment and has been squeezed into an area not large enough for the four letters. Despite the authors' attempt to make a revision, the study still refers to Orem as one of the *adjacent* communities to Orem. Missing from the list of adjacent communities is Lehi, once again confirming the fact that the study was actually prepared for the City of Lehi.

Another example of the study's application to a different locale, is the fact the study focuses on the impact in northern Utah County (where Lehi is located, but not where Orem is situated). For example, on p. 4 under "Criteria #4", it states: "The Feasibility Study clearly

demonstrates the need for more skilled nursing beds in *northern* Utah County." That may be very interesting (although incorrect), but it doesn't apply to the site of Pointe Meadows' proposed facility. Obviously, the question should be: *Is there a need for more skilled nursing beds in the City of Orem?* The study does not even pretend to address this need. The study goes on to say (same paragraph) that "Current trends suggest greater than 10% growth patterns in the rural communities in the *northern area* of Utah County." Once again the focus is on northern Utah County, not the City of Orem.

It is also clear that the original Study was for a "30" bed facility. The owners of Pointe Meadows were so rushed that they failed to type in the revised "36" figure, but rather handwrote it in several areas, although failing to make the change other times altogether. For example, on the very first line of the study at p. 3, under "Executive Summary", the typewritten portion still refers to "thirty beds", while there is a handwritten "36" in parentheses. On p. 6, under the heading "Business Overview", the first line (unrevised) refers to a "30" bed facility. On p. 4, under "Criteria #2", it states "Pointe Meadows would need to capture less than 1% of the population of seniors 65+ to fill its "36" beds (the number 36 is handwritten in place of the previous amount). However, on p. 15, it states that "Pointe Meadows would need to capture less than 1% (30 beds) of the residents 65+ to fill their beds to capacity..." While the number of beds may not be particularly significant, the internal inconsistencies in the hastily prepared study demonstrate that it was prepared for a different entity and location than the current applicant.

Another clear example of the study applying to northern Utah County and not to Orem, is the discussion of "impact" that the facility will have on Orchard Park, one of the Intervenors in this case. In the heading entitled "Competition Analysis," Pointe Meadows claims

that it will have only a "minor" impact on Orchard Park, despite the fact that the new facility will be approximately one mile from Orchard Park. The adjective "minor" may have been a more fitting adjective if the facility had proceeded in Lehi, more than 12 miles away. However, in Orem, the facility will have a significant adverse financial impact on Orchard Park and all neighboring facilities.

In addition to the wide ranging errors and inconsistencies is the fact that the study includes, on p. 27, population and growth information downloaded from the City of Lehi Planning Department, containing census information for the City of Lehi. There is no such study for Orem City, or any other city in Utah County. The feasibility study should be rejected.

3. THE STUDY CONTAINS UNSUPPORTED STATEMENTS CONTRADICTED BY THE FACTS.

a. The Study Inaccurately States that there is a Demand for More Skilled Nursing Beds.

On p. 4, Pointe Meadows asserts that the study "clearly demonstrates the need for more skilled nursing beds in northern Utah County." As noted above, Orem is not in northern Utah County. Nor is there any evidence or analysis of the need for beds in Orem or any other location in Utah County. In fact, based upon the information contained in the study, it is clear that there is no demand for skilled nursing beds; to the contrary, there is an oversupply of skilled nursing beds.

On p. 16 of the study, there is a paragraph devoted to each of the existing 15 facilities in Utah County. The study then identifies the number of overall beds, average occupancy and the number of occupied Medicare beds. The information is summarized below:

FACILITY	Total BEDS	OCCUPIED	MEDICARE
East Lake Care Center	189	105	10
Trinity Mission Health & Rehabilitation	99	65	10
Transitional Care Unit of Utah Valley	16	10	8
Payson Nursing and Rehabilitation	40	32	5
Orem Nursing and Rehabilitation	120	85	20
Orchard Park Care Center	89	70	25
Heritage Convalescent Center	106	92	25
Country View Manor	50	40	3
Art City Nursing and Rehabilitation	55	40	5
Alpine Valley Care Center	52	45	7
Transitional Care Unit of Mountain View	16	10	9
Berkeshire Rehabilitation[8]	14	10	0
Transitional Care Unit of American Fork	12	9	9
Spanish Fork Nursing	29	20	0
Hobble Creek Nursing & Rehabilitation	44	25	0
TOTALS	931	658 (70.7%)	136

As can be seen from the above table, the current bed occupancy *according to the study* is 70.7%.[9] In other words, there is currently a 30% vacancy bed rate in Utah County skilled nursing facilities. The occupancy continues a downward trend of bed utilization that has been going on for at least the past ten years For example, in the Review of Utah Medicaid Nursing Home Bed Moratorium 1989-2001, published by the Department in May 2002 ("2002 UDOH Study," See Exhibit "G"), the occupancy rates of Medicare/Medicaid Certified Nursing Homes were as follows in 1997-2001 (see pp. 29-30):

[8] The study shows Berkeshire with no Medicare census. Berkeshire has more than ten to fifteen Medicare residents.

[9] The figures in the feasibility study actually *overstate* the occupancy rate. As noted in the Robert Steggell Affidavit (¶¶ 3, 5), Rock Canyon has 220 beds (instead of 189), but only averages 45% occupancy. Revising the numbers accordingly, results in an overall occupancy rate of 67.8% in Utah County.

1997 Occupancy	81.4%
1998 Occupancy	80.1%
1999 Occupancy	78.6%
2000 Occupancy	77.5%
2001 Occupancy	76.0%

The above trends reflect a downward movement of a little over 1% per year. Five years later[10], the figures contained within the Pointe Meadows' feasibility study reports the occupancy of 70.7%, which shows a continuing deterioration of 1%+ per year, an occupancy rate that can best be described as depressed.

It is interesting to note that in the 2002 UDOH Study, "Utah's nursing home industry has a low occupancy rate in comparison with other mountain states." Of the nine mountain states, only Idaho has a lower occupancy rate. (2002 UDOH Study, See Exhibit "G", p. 11.)

The above statistics are the nature and type that should have been presented in the Pointe Meadows's feasibility study; the owners of Pointe Meadows had ready access to the above studies (as they are easily obtainable on the Internet), yet they ignored them. Rather, they have inaccurately stated the state of bed occupancy in Utah County, by claiming that there is a "need for more skilled nursing beds."

Furthermore, even if reliance is placed upon growth projections in the study (which are inaccurate), the increase in population over the coming years will not justify an increase in skilled nursing beds *according to the study*. On p. 4 of the study, under "Criteria #2", it states

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[10] The Study was purportedly prepared in October 2007, according to the Face Sheet, meaning that the more recent available data would have been for the 2006 calendar year.

that: "By 2030, Utah County will experience an increase in overall population by 6%." On p. 13 of the study, it continues: "By 2030, Utah County will experience an increase in overall population by 4%+." Taken on their face, neither of the statements demonstrates growth requiring more skilled nursing beds by 2030.

Finally, on p. 4 of the study, under the category "Criteria #4", it states: "The age and size of the facilities currently in Utah County has not provided the options seniors are demanding." There are no letters, studies, articles, or any other evidence offered in support of this claim. Statements in a feasibility study should be supportable, not merely self-serving statements manufactured to increase the likelihood of licensure.

b. Statistical Information in the Study is Unsupported and Inconsistent.

There are numerous instances of statistical information and/or estimates in the feasibility study that have no support or origin. For example, on p. 4 of the Study, it states that: "Current estimates suggest that the demand for skilled nursing will double in the next thirty years." There is no reference made to which estimates the authors are addressing. On p. 4 of the study, under "Criteria #1", it states: "More than 12 million people in the United States currently need some kind of skilled nursing care. About a third of these people have rehabilitation and nursing care needs that are substantial." Once again, no references or support is provided. There are numerous similar instances in the study where statistics are cavalierly offered without any back-up. In addition, the statistical information offered in one section of the study is often contradicted by information contained in another section. (See growth and population trends).

c. Information Concerning Existing Facilities is Inaccurate.

Much of the information in the feasibility study that addresses competing facilities in Utah County under "Competitive Analysis" (pp. 16-19) is false, as shown by the following excerpts from Intervenors' affidavits:

Rock Canyon's administrator (formerly East Lake Care Center) cites "many inaccuracies" in the report "despite the fact that information concerning Rock Canyon is readily available from public records." Among those errors are the number of beds in their facility which is actually 220, not 189; the fact that Rock Canyon operates at just a 45% occupancy rate, not 56%; that Pointe Meadows statement that it "will admit residents south of Provo who prefer to have a smaller facility closer to home" is ridiculous, since Rock Canyon, which is in Provo, is obviously "much closer to the 'south of Provo' than the Pointe Meadows' Orem facility would be." (See Robert Steggell Affidavit, paras. 2-5.)

d. The Study Vastly Understates and Distorts the Impact on the Existing Facilities.

On p. 15 of the study, it states that "Pointe Meadows would need to capture less than 1% (30 beds) of the residents 65+ to fill their beds to capacity and maintain a high average daily census." With this statement, Pointe Meadows endeavors to minimize the impact that its facility will have on existing facilities. This statement suggests that there must be at least 3,000 residents that require Medicare-covered skilled nursing assistance in Utah County (30 beds divided by 1%). Once again, the "facts" asserted by Pointe Meadows are wrong. According to the study, there is an average Medicare-resident census of *only* 136 in Utah County. If Pointe Meadows intends on capturing *less than 1% of these residents,* then it would result in just one resident at their facility. The reality, which is never discussed in the study, is that Pointe Meadows has to be intending on

taking more than 26% of Medicare skilled nursing residents in Utah County and nearly two-thirds of all Orem Medicare residents.

What is left unspoken in the study is the fact that the Medicare residents subsidize, to a large extent, Medicaid residents and other non-Medicare residents. A skilled nursing facility receives approximately three times as much income from a Medicare resident as it does from a Medicaid resident.[11] For illustration purposes, if a facility has 20 beds, 14 of which are occupied (3 Medicare and 11 Medicaid), using $1 in revenue for Medicaid residents and $3 in revenue for Medicare residents, the total resident income is $20. Assuming a 15% profit margin before taxes, the facility earns $3. If the facility loses one Medicare resident, it will operate at a break-even status. If it loses two Medicare residents, it will be losing 15%.

The adverse financial impact of a new Medicare-only facility has been proven in other communities. For example, as a result of the recent entry of a Medicare-only facility, Capital Care Center in Boise, Idaho has suffered a drop in Medicare income of about 20%, which has caused their net profit before taxes to be cut in half (from 15% to 7%). A Scottsdale Arizona facility was operating slightly better than break-even before a new Medicare-only facility entered the market, and now is losing more than $50,000 a month—and will likely not survive to the end of the current calendar year. (See Allen Affidavit, para. 13.) There are many other similar examples in Utah and neighboring states.

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[11]Utah's Medicaid rates are found at: http://health.utah.gov/medicaid/stplan/NursingHomes/NH_RateModel_FY08_Q3%20vFinal.pdf. Utah's Medicare rates are found in 42 CFR Part 409. A revised rule is pending publication in the Federal Register. The Medicare rates for FY 2008 begin on p. 28 of that CMS-approved document (CMS-1545-F, RIN 0938-A064).

Of the 136 highly sought after Medicare beds in Utah County, Pointe Meadows wishes to take away 36 of those beds, without offering any care for Medicaid patients.[12] By allowing Pointe Meadows licensure, Pointe Meadows will become enormously profitable, while existing centers will suffer significantly; some will be forced to close their doors. Licensing Pointe Meadows would reward a brand-new facility at the expense of penalizing the other facilities that have been providing outstanding care to the senior population for many years. Indeed, some of the Intervenors have received acclaim for their outstanding service and quality care. Orchard Park, for example, has been honored as the No. 1 nursing home in Utah County for the past five years. (See Justin Allen Affidavit, ¶ 12.)

In the City of Orem, with an existing Medicare census of fifty residents (according to the study), a loss of 36 Medicare residents would be catastrophic. The inevitable result will be the ultimate closure of facilities that have been supporting both the Medicare and Medicaid population.

V. THE SEVERE IMPACT OF THE PROPOSED FACILITY ON THE QUALITY AND AVAILABILITY OF SKILLED NURSING CARE MANDATES DENIAL OF THE LICENSE TO POINTE MEADOWS

Even assuming (contrary to law) that Pointe Meadows' Notice of Intent meets the requirements of the limited exception to the moratorium, Pointe Meadows does not qualify for a license because of the adverse impact its proposed facility will have on existing facilities and the Medicaid program. At a minimum, that statutorily mandated evaluation requires that the Department analyze the impact the proposed facility will have on the Medicaid program and the health of the people of the state pursuant to Utah Code Ann. § 26-18-502(1)(a). The legislature empowered the Department to license

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[12] On p. 19 of the study, it states: "Pointe Meadows *will not provide Medicaid services*."

health care facilities. Accompanying that power is the requirement to act. The expectation is that the Department will do more than request information, review it, and return it to the applicant with a license. The demands of the public interest are greater than that.

A. SURROUNDING FACILITIES WILL SUFFER SEVERE FINANCIAL LOSS.

Revenues from Medicare patient reimbursement constitute a significant share of existing facilities' revenues. The Department acknowledged that fact in a proposed rule October 15, 2006.[13] A financial analysis of the impact Pointe Meadows' proposed facility would have on each of the Intervenors demonstrates severe financial loss.[14]

1. ORCHARD PARK CARE CENTER

The Administrator of Orchard Park estimates the financial loss due to reduction in Medicare patients as follows (See Affidavit of Justin Allen, ¶ 11):

> "In January 2008, the facility generated $72,234 in net profit before taxes. Losing 15 Medicare residents would result in a net operating loss of $76,818 per month. At that rate, Orchard Park would lose $900,000 annually, which would force the facility to close its doors and discontinue operations."

The financial loss to Orchard Park equates to approximately $150,000 *per month* in operating margin, or $1,800,000 per year in lost profits.

2. ROCK CANYON REHAB & NURSING

The Administrator of Rock Canyon described the financial impact of Pointe Meadows opening a facility in Orem as follows (See Affidavit of Robert Steggell, ¶ 5):

> "If Pointe Meadows is granted a license, our occupancy may decline to under 40%, which would put the facility in the red. A reduction or elimination of Rock Canyon's Medicare

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[13] Proposed rule published October 15, 2006 in Utah Bulletin Vol. 2006, No. 20, p. 62.

census would have a dramatic negative financial impact on our facility, making it difficult to provide quality care and stay in business."

3. TRINITY MISSION HEALTH & REHABILITATION

The Regional Administrator of Trinity estimates the financial loss that would be associated with the opening of Pointe Meadows as follows (See Affidavit of Brian Brinkerhoff, ¶ 3):

> "From my professional perspective, if Pointe Meadows is allowed to open, it would capture approximately 12 of our 17 Medicare beds. Such a reduction in our Medicare census would have a far-reaching adverse impact on Trinity's operations. It would result in a loss of $135,393 monthly revenue, or $1.6 million annually. Trinity is operating at a very slim margin, and a loss of the Medicare business would cause Trinity to operate at a significant loss."

An estimate of annual loss in revenue for the four above facilities is between $4 and $5 million resulting from Pointe Meadows being granted a license to operate a Medicare only facility.

B. THE QUALITY OF CARE WILL SUFFER ADVERSELY IF POINTE MEADOWS IS ALLOWED TO CONDUCT A MEDICARE-ONLY FACILITY IN OREM.

In addition to the severe financial loss, the quality of care among surrounding facilities will be compromised as well. Comments from the Intervenors are illustrative of this point:

> "A reduction or elimination of Rock Canyon's Medicare census would (make it) difficult to provide quality care....With over 120 beds available for use in our facility, it does not make sense to add a new facility that will cause additional strain to the already limited resources and undercapacity that exists in our community. Excellent care depends in large part, on the quality of staff and personnel. Utah is no different than any other state in the nation, when it comes to a lack of and need for additional qualified personnel. The addition of another 24-hour operation would negatively impact all providers by drawing away key personnel from those facilities. In addition, the inevitable decline resulting from a Medicare only facility, would make it more difficult to attract quality personnel."

(See Robert Steggell Affidavit, ¶¶ 5-7.)

> "Faced with escalating wages, therapy costs and survey compliance, the loss of revenue from Pointe Meadows would be devastating, thus adversely impacting resident care in the Provo City Area....A loss of revenue of the magnitude threatened would make it extremely difficult, if not impossible, to maintain the quality of care that Trinity prides itself in, especially with other operating costs increasing annually."

(See Brian Brinkerhoff Affidavit, ¶¶ 4-5.)

> "Presently, Orchard Park has been able to provide an extremely high level of care and quality of services for all residents.... The revenue from Medicare enables Orchard Park to provide a high level of care to Medicare *and* Medicaid patients. A significant loss of Medicare residents would make it extremely difficult to maintain the present high level of care provided to senior citizens."

(See Justin Allen Affidavit, ¶ 12.)

As can be seen from the above statements, the future implications of the Pointe Meadows' application goes far beyond the severe financial loss to existing facilities, it threatens the quality and availability of care for senior citizens in Orem and surrounding communities.

The Pointe Meadows' proposed facility will clearly have a devastating impact on existing facilities both financially and in the way of quality of care. That impact will harm the Medicaid program because the existing facilities will not be able to adequately serve Medicaid patients and still recover their costs. Costs of the Medicaid program will increase precipitously which will cause further harm to the people of this state. Pointe Meadows on the other hand, had not expended sufficient resources on the proposed Medicare-only facility to file an application before the statutory deadline. Under these circumstances, the harm to the public interest far outweighs Pointe Meadows' minor loss of filing a Notice of Intent. The Department must reject Pointe Meadows' Notice of Intent and any subsequent application. For the Department to grant a license to Pointe Meadows, it would have to ignore its own rule addressing the impact on existing facilities, the legislature's public interest finding, and the steps the legislature took in 2004 and 2007 to protect the Medicaid program.

VI. CONCLUSION

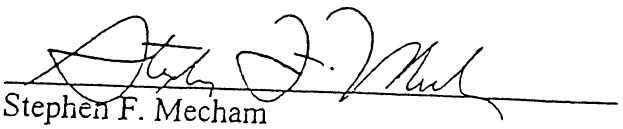
Due to oversupply, the Utah Legislature has enacted laws to protect and limit the number of skilled nursing centers. The law mandates strict compliance for those who attempt to qualify for the

narrow exception to the moratorium imposed by the legislature on February 28, 2007. Pointe Meadows has failed to meet the requirements of this narrow exception, by failing to file its application by the deadline, by failing to file its feasibility study on time, by moving its proposed facility from Lehi to Orem well after the deadline, and by changing the operating entity of the Orem facility after the deadline. Any one of the above failures is enough for the Department to deny licensure. Special dispensation should not be granted to an unproven applicant that has failed to comply with Utah law and Department rules.

Pointe Meadows' feasibility study is inadequate, inaccurate, and disingenuous. Proclaiming a demand for more beds in an area where facilities are severely underutilized and pretending to take less than 1% of the area residents is misleading. Furthermore, Pointe Meadows has failed to identify the financial impact of its proposed facility on existing facilities in Utah County. There has been no effort to quantify the financial impact on those facilities, yet as these comments illustrate, the impact would be significant and potentially devastating to the existing facilities and to the Medicaid program. The Department is charged to protect the Medicaid program and thereby the public interest. Accordingly, the Department should not grant Pointe Meadows the license it seeks.

DATED this 25th day of March, 2008.

CALLISTER NEBEKER & McCULLOUGH



Stephen F. Mecham
Mark L. Callister

Certificate of Service

I hereby certify that March 25, 2008, a true and correct copy of the Statement of Standing, Petition to Intervene and Comments of Berkeshire Rehabilitation, Orchard Park Care Center, Rock Canyon Rehab and Nursing, and Trinity Mission Health and Rehab Orchard Park Care Center was sent in the United States Mail, postage prepaid, to:

Pointe Meadows
c/o Orem Ventures Inc.
791 West 800 South
Mapleton, Utah 84664

I also hereby certify that I emailed and hand delivered a true and correct copy of the foregoing Statement of Standing, Petition to Intervene and Comments on March 25, 2008 to the office of:

Allan Elkins
Director
Bureau of Health Facility Licensing, Certification, and Resident Assessment
aelkins@utah.gov

Corinne Hoffman
choffman@utah.gov

Department of Health
Bureau of Health Facility Licensing, Certification, and Resident Assessment
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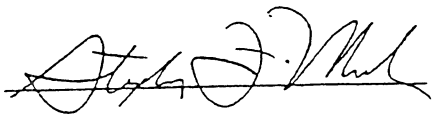

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BEFORE THE UTAH DEPARTMENT OF HEALTH

DIVISION OF HEALTH SYSTEMS IMPROVEMENT
STATE OF UTAH

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IN RE: POINTE MEADOWS

Recommended Decision to Affirm
Denial of Intervention
Case No. 08-260-02

Margaret J. Clark
Administrative Law Judge

Pursuant to Utah Administrative Licensing Rule R432-30, Utah Division of Health Systems Improvement/Licensing and Utah Code Title 63G, Chapter 3, a prehearing/status conference telephone conference was held on October 21, 2008, at the Cannon Health Building, Room. 344, 288 N. 1460 W, Salt Lake City, Utah 84116. Assistant Attorney General Lyle Odendahl represented the Division of Health Systems Improvement, Department of Health. J. Andrew Sjoblom represented Pointe Meadows. Stephen F. Mecham represented Orchard Park Care Center, Rock Canyon Rehabilitation and Nursing, and Trinity Mission Health and Rehabilitation (hereinafter referred to as "Interested Parties".)

ISSUE

1. IS THERE AN ADJUDICATIVE PROCEEDING INTO WHICH POTENTIAL LICENSEES AND POTENTIAL INTERVENORS CAN INTERVENE?

2. ARE INTERESTED PARTIES ENTITLED TO INTERVENE IN THIS LICENSING APPLICATION?

PROCEDURAL FINDINGS OF FACT

1. Pointe Meadows, hereinafter referred to as "Potential Licensee," filed a notice of intent for a 36-bed skilled nursing facility in Lehi, Utah County, on February 28, 2007.

2. Pointe Meadows submitted a license application/request for agency action on March 29, 2007.

3. Pointe Meadows initially made a substantial investment in a Lehi nursing facility location, paying for building and engineering plans, and construction including excavation, footing forms, and the foundation.

4. Subsequently, Utah Department of Transportation (hereinafter"UDOT") informed Pointe Meadows and the Department of Health, (hereinafter "DOH"), that it intended to take the Pointe Meadow's Lehi property through eminent domain proceedings if the land was not sold voluntarily.

5. Pointe Meadows sold the Lehi property to UDOT and retained a consultant to search for other suitable real estate in Utah County to relocate the skilled nursing facility that had initially been planned for Lehi.

6. Before the Orem property was purchased, Pointe Meadows contacted Allan D. Elkins, the Director of DOH's Bureau of Health Facility Licensing, Certification, and Resident Assessment to request that the project be transferred from the Lehi location to the Orem location under the existing Notice of Intent and License Application.

7. In an email to Pointe Meadows, Director Elkins stated: " I have reviewed the information that you and UDOT have given me, and discussed it with our lead Assistant Attorney General. We agree that you may transfer your application from the Lehi location to the Orem location. Due to the unusual circumstances of your case, this decision is not to be taken as precedent."

8. After receiving Director Elkins email, Pointe Meadows purchased land in Orem in January 2008.

9. On January 5, 2008, Pointe Meadows broke ground at the Orem location.

10. DOH allowed an amended application for the skilled nursing home in Orem on or about May 21, 2008.

11. Pursuant to the DOH's administrative rule R432-2-6(5), Pointe Meadows submitted a feasibility study for the proposed facility.

12. The Department published public notice of its feasibility study in a newspaper in general circulation for Utah County pursuant to R432-2-6(5).

13. Interested Parties provided public comment on the feasibility study, which is allowed under R432-2-6(5)(C).

14. On March 25, 2008 Interested Parties petitioned DOH to intervene for alleged "insufficient filing" of its feasibility study by Pointe Meadows.

15. Interested Parties are extremely concerned about the Bureau's November 6, 2007 email, in which Pointe Meadows was allowed to transfer its application from an original Lehi location to an Orem location.

16. Bureau Director Elkins issued an order denying Interested Parties Petition to Intervene, stating: "After review of all the materials, I conclude that the other issues [raised by Interested Parties in their Petition] are not germane to the issue of whether the applicants have met the rule's feasibility study requirements and will not be considered in this response..."

17. Director Elkins affirmed the denial in a letter dated August 13, 2008.

18. Pointe Meadows hurriedly revised its feasibility study before submitting to the financing bank and DOH, before the Utah Legislature would enact a moratorium on licensing non-certified skilled nursing facilities.

19. No skilled nursing facility licenses have ever been denied based upon negative comments submitted regarding a feasibility study or the viability of a project based upon a feasibility study; rather, the information is for use by the potential facility for self-improvement.

20. The Department's Health Facility Committee, the statutory committee empowered to make and change licensing rules, reconsidered the use of the feasibility study in 2005, in a sub-committee and full committee. Both committees accepted that the rule did not empower the department to deny a license on the basis of any comments received during the feasibility study process, and the relevant rule as left unchanged.

21. In a letter to Interested Parties, dated June 5, 2008, Allan D. Elkins, Director of the Bureau License, Certification and Resident Assessment, reviewed Interested Parties comments and provided them to the potential licensee, but he found that the comments did not justify denying it a license.

22. In a letter dated August 13, 2008, Interested Parties filed a Request for Reconsideration from Mr. Elkins, which he granted, resulting in the current proceeding.

CONCLUSIONS OF LAW

1. A request for agency action could initiate an adjudicative proceeding pursuant to Utah Code 63G-4-201, and a formal hearing could be held, if necessary, for a potential licensee or an intervenor, if the intervenor meets the criteria for intervention.

2. Interested Parties are not entitled to intervene in the licensing of Pointe Meadows nursing facility because of the very unusual facts of this case, including: the need for eminent domain, the small number (36) of Medicare beds at stake and a mere 12-mile difference in the initially proposed and final location of the facility. Considering the amount of time, money, and resources it would cost the Department for formal discovery and to conduct a formal hearing, at this late date, an administrative hearing that does not directly address the potential licensee, but an intervenor is unnecessary, contrary to the Bureau's precedent, and not in the best interest of the public or the Medicaid program.

REASONS FOR DECISION

POINT ONE

Title 63G, Chapter 4, is the Utah Code's Administrative Procedure Act ("UAPA"). The commencement of adjudicative proceedings is set forth in UAPA 63G-4-201(1)(b). That Section reads as follows:

> (1) Except as otherwise permitted by Section 63G-4-502 [emergency proceedings], all adjudicative proceedings shall be commenced by either:
>
> (a) a notice of agency action, if proceedings are commenced by the agency; or
> (b) a request for agency action, if commenced by persons other than the agency.

Adjudicative proceedings were potentially commenced when Pointe Meadow filed a "Request for Agency Action/Licensing Application."

Although the Department's Rule R432-30-2 indicates that Department staff will reach initial determinations regarding license applications, without conducting adjudicative proceedings, Utah Code 63G-4-201(1)(b) allows a hearing when one is warranted, but does not require a hearing. As Assistant Attorney General Odendahl noted in his brief, if no hearing were ever allowed after application, even the applicant for a license would be precluded to challenge a Bureau decision until the license application process and the facility is completed.

Potential Licensee correctly indicated in its brief, Director Elkins statement during the October 21, 2008 pre-hearing was that the Potential Licensee would be issued a license, after the matter was reviewed by a Hearing Officer. Director Elkins did not make the legal decision that a hearing was not necessary, but asked that a presiding officer be appointed.

POINT TWO

THERE IS NO NEED FOR A HEARING FOR THE POTENTIAL LICENSEE AND THERE IS NO SUBSTANTIAL NEED FOR INTERVENTION.

Director Elkins stated at the prehearing conference that Pointe Meadows was ready to be licensed as long as it complies with any remaining obligations.

In its enabling statute, Utah Code 26-1-30, the Legislature granted to the Department of Health many responsibilities, including the ability to:

> (a) promote and protect the public health and wellness of the people within the state.
> (b) establish, maintain, and enforce rules necessary or desirable to carry out the provisions and purposes of this title to promote and protect the public health or to prevent disease or illness;...
> (v) conduct health planning for the state
> (w) monitor the costs of health care in the state and foster price competition in the health care delivery system; [emphasis added], and;
> (x) adopt rules for the licensure of health facilities within the state pursuant to Title 26, Chapter 21, Health Care Facility Licensing and Inspection Act.

The mandate to foster price competition in the health care delivery system is inconsistent with the notion that DOH should use its health resources to do an in-depth review of how the licensing of one facility would financially affect facilities around it. Obviously, the top priority of DOH is to promote and protect the public health of the people in the state. DOH's expertise is in health-related matters, not complicated financial dealings, which affect mainly the nursing facilities' owners' profits, not the health or welfare of Medicaid patients or the general public. It must also be considered that Interested Parties are indeed NOT parties to this matter; instead they are potential intervenors and want to cause a hearing to be held when it is not necessary

By the terms of the enabling statute, the Legislature has given the Department of Health rulemaking authority to regulate the Division of Health Systems Improvement/Licensing, realizing its expertise in health matters, nursing facilities and Medicaid. The Division duly enacted R432-2-6, with an accompanying comment period. It was the Division who created the mandate of a feasibility study. When it created this mandate, its clear intent was to help the potential licensee.

Administrative Rule R432-2-6 provides as follows regarding the feasibility study.

(A) The feasibility study shall be a written narrative and provide at a minimum:

(I) the purpose and proposed license category for the proposed newly licensed capacity;
(ii) a detailed description of the services to be offered.
(iii) identification of the operating entity or management company;
(iv) a listing of affiliated health care facilities;
(v) identification of funding source(s) and an estimate of the total project cost;
(vi) an estimate of total operating costs, revenues, and utilization statistics for the twelve month period immediately following the licensing of the new capacity;
(vii) identification of all components of the proposed newly licensed capacity which ensures that residents of the surrounding area will have access to the proposed facility or service.
(viii) identification of the impact of the newly licensed capacity on existing health care providers;...
(ix) a list of the type of personnel required to staff the newly licensed facility and identification or the sources from which the facility or agency intends to recruit the required personnel.

(b) applicant or licensee shall submit the feasibility study not later than the time construction plans are submitted. The applicant or licensee shall submit the feasibility study no later than the construction plans are submitted.

(C) The Department shall publish public notice at the applicant's expense, in a newspaper in general circulation for the location where the newly licensed capacity will be located that the feasibility study has been completed. The Department shall accept public comment for 30 days from the initial publication. The Department shall retain the feasibility study, summarize the public comment for 30 days from the initial publication . The Department shall retain the feasibility study and make it available to the public.

(d) The Department shall review the feasibility study, summarize the public comment, review demographics of the geographic area, involve and prepare a written evaluation to the applicant regarding the viability of the proposed program.

The Department and the licensee complied with all of the applicable law cited above. Unlike Interested Parties contend, allowing Potential Licensee to transfer its application from Lehi tc Provo was in the public interest of eminent domain, and thoroughly within the Bureau's discretion. Pointe Meadows was already working closely with DOH when DOT informed it of eminent domain.

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Interested Parties over-emphasize requirement number viii, out of the nine requirements required in the feasibility study, set forth in R432-2-6, as quoted above, and give it more importance than apparently intended, based on the past actions of the Division. Indeed, there is NO precedent for this [see Director's letter below]. Admittedly, there were some inconsistencies and inaccuracies in the Feasibility Study, but they were not significantly material or relevant to the Director to shut down the licensing process for Pointe Meadows. In the Director's Denial of the Interested Parties to Request to Intervene, dated June 5, 2008, he indicated:

> The Department has, in all previous license applications, interpreted the feasibility study requirement of the rule to be an exercise for the applicant to go through in order to clarify for the applicant the project is undertaking. Additional purposes are to provide information to the community and to allow comments on the plan. In the years since the rule originally passed, the department has received few negative comments on such projects. In one case, over sixty comments were received, many negative. The Department did not, in any case, use these negative comments to intervene in the license application of any facility in question. Rather, the information was given to the applicant for the applicant's review and use in self-improvement, if desired, as the applicant finished its licensing process. No licenses have ever been denied on the basis of comments received concerning the feasibility study or the viability of a project based on a feasibility study [emphasis added].

Interested Parties contend that there is precedent for them to intervene in Pointe Meadows licensing application procedure. They cite *Sierra Club v. Utah Air Quality, 148 P.3d 960 (*Utah 2006*)*. *Sierra Club* is distinguishable from the case at hand, based upon the facts. In *Sierra Club,* the case addresses three criteria: (1) the potential interested parties have been or will be adversely affected by the challenged actions; (2) there is a causal relationship between the injury and the challenged actions; and (3) the requested relief is substantially likely to redress the injury claimed. [emphasis added]. In this case, the impact of a re-location of 12 miles within the same county (caused by eminent domain) and the small number of Medicare beds at stake, is not sufficient to warrant intervention into this administrative proceeding, and cause a hearing at this late date. Dicta in *Sierra Club,* addresses how people living or recreating near the coal-fired power plant in issue did not meet the legal requirements of intervention because, "[s]uch generalized interests were too attenuated to create a sufficient personal stake in the litigation and would not satisfy the adverse effects requirement. The *Sierra Club* court added: "The determination of what claimed interests are sufficient and what interests are too attenuated must be made on a case-by-case basis, taking into account all relevant facts and the policies underlying our standing requirement." In an important footnote that would apply to the instant case, the court opined: "Generally, the determination of whether a plaintiff has alleged a sufficient interest in order to satisfy the adverse impact part of the traditional test can be made on the face of the pleadings." Pleadings in *Sierra Club* indicated contamination of the soil and damage to ones crops and emissions that were alleged to cause physical harm to children were sufficient to

warrant intervention. Pleadings such as those in the instant case that allege devastation to the Medicaid program, fail to set forth sufficient detail and a causal relationship between the licensing of Pointe Meadows and the alleged harm.

First, the harm that Interested Parties seek to redress is speculative and the eminent domain proceedings make the case unusual. No matter how much harm is exaggerated, the licensing of one 36-bed Medicare skilled nursing facility only 12 miles from the original intended location, could not possibly cause the amount of harm alleged. Second, in *Sierra Club,* the potential harm was actual physical harm, and the action of the Air Quality Board violated Federal law. Assuming that the *Sierra Club* precedent would normally be applicable, it simply is not applicable to these facts, where the Potential Licensee was forced to move because of eminent domain, and the potential harm to Interested Parties is financial, speculative, and insignificant to warrant discovery and intervention in a formal hearing at this late date.

Interested Parties claim that there is no record for an appellate court to review. That is inaccurate. The Department files all pleadings and correspondence in a case file, in the normal course of business. Interested Parties have not alleged enough specificity in their pleadings to make their claims of devastation credible enough to warrant intervention at a formal hearing. Interested Parties merely summarily state that the licensing of Pointe Meadows would devastate the existing facilities and the Medicaid program. The Director of Health Systems Improvement obviously disagreed. Even, assuming for the sake of argument, the feasibility study more closely addressed the previous intended location more than the current one: (1) the potential licensee's site is only 12 miles from the former one; (2) it will contain only 36 Medicare beds: and (3) it is in the same county as the former intended location. With years of experience and expertise invested in health and Medicaid fields, it seems ludicrous to surmise the Director would allow the Medicaid program to be "devastated" by the mandatory re-location and the licensing of Pointe Meadows.

UTG

SUMMARY

The Division of Health Systems Improvement, Utah Department of Health, acted reasonably under the unusual circumstances of this case. At the prehearing, Mr. Allen Elkins stated he was ready to license Pointe Meadows barring any remaining unmet obligations on the part of Pointe Meadows. If there are no remaining unmet obligations, the licensing of Pointe Meadows should occur without further delay and without the need for a hearing.

DATED this 3 day of December 2008

Margaret J Clark
Administrative Law Judge

No: 08-260-02

CERTIFICATE OF MAILING

I hereby certify that on the 8 day of December 2008, I mailed a true and correct copy of the foregoing NOTICE, to the following parties:

POSTAGE PREPAID

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CALLISTER NEBEKER & MCCULLOUGH
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J ANDREW SJOBLOM
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INTER-DEPARTMENTAL MAIL

DR DAVID SUNDWALL, EXECUTIVE DIRECTOR
UTAH DEPARTMENT OF HEALTH

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